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NO. 84 6520 (1)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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ALLEN LEE DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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153 pp

## QUESTION PRESENTED

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## TABLE OF CITATIONS

## CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is Davis v. State, 461 So.2d 67 (Fla. 1984), and is set forth in Appendix A. The motion for rehearing and the denial thereof are set forth in Appendix B and C.

## JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on October 4, 1984, and petitioner's timely motion for rehearing was denied (in light of revised opinion) on January 17, 1985 [Appendix C].

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), and involves the Sixth and Fourteenth Amendments to the United States Constitution, and specifically the affirmative constitutional obligation of the trial court to minimize the effects of prejudicial pre-trial publicity. See e.g. Gannett Co. v. DePasquale, 443 U.S. 368,378, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Nebraska Press Association v. Stuart, 427 U.S. 539, 602, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)(Brennan, J., concurring).

## STATEMENT OF THE CASE

Petitioner was charged by indictment returned May 27, 1982, with three counts of first-degree murder, in the deaths of Nancy Weiler and her daughters Kristina and Katherine Weiler. The murders, and petitioner's arrest, had been the subject of extensive publicity in the Jacksonville and Duval County media, much of it highly inflammatory and prejudicial in nature. [The disclosures of inadmissible information and the emotional reportage and commentary which impacted upon petitioner's ability to secure a fair and impartial jury is discussed at pages 4-12, infra]. On June 9, 1982, petitioner (then represented by the Public Defender's Office) filed a motion for individual and sequestered voir dire, asking that the trial court allow counsel to question prospective jurors individually and outside of one another's hearing, in order to ascertain their knowledge of the case based on pre-trial publicity and to discern their attitudes toward capital punishment [Appendix D]. The motion stated,

inter alia, the following grounds:

> A. In order to obtain a fair and impartial jury, it is absolutely essential to inquire of each prospective juror about his knowledge of the offense, the parties, and the witnesses. It is necessary to inquire what the venireman's knowledge is and to ask questions to determine how that knowledge will affect his deliberations.
>
> 1. By explaining what he has heard about the charges or what he knows about parties or witnesses, a venireman may very likely impart his knowledge to the other prosective jurors unless there is individual, sequestered voir dire. Such knowledge, which is often based on opinion, rumors, hearsay, media coverage, and other sources of inadmissible evidence, can taint the entire venire that is exposed to it and serve to deny the Defendant a fair trial by an impartial jury (citations omitted).
>
> 2. Whenever there is believed to be a significant possibility that individual talesman will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. Standard No. 3.4, American Bar Association, Standards Relating to Fair Trial and Free Press; (citation omitted).

On August 11, 1982, the defense filed a motion for change of venue [Appendix E]. The trial court, over defense objection, deferred ruling on the motion until an attempt had been made to select a jury in Duval County. The Public Defender's Office was subsequently allowed to withdraw from representation of petitioner on the basis of conflict of interest. Attorney Frank Tassone was appointed to represent petitioner. On January 7, 1983, Mr. Tassone filed a Notice of Adoption of Previously Filed Motions, in which he adopted, inter alia, the motions for change of venue and for individual and sequestered voir dire which had previously been filed on petitioner's behalf.

The case proceeded to trial on January 31 - February 4, 1983. Immediately prior to jury selection, defense counsel called the trial court's attention to the pending motion for individual and sequestered voir dire, which the trial court thereupon denied.

At the conclusion of the trial, the jury returned verdicts finding petitioner guilty as charged of three counts of first degree murder. The penalty phase of the trial was conducted on February 9, 1983. The jury recommended imposition of the death penalty as to all three counts. In accordance with the jury's recommendation,

the trial court, on March 2, 1983, imposed three sentences of death upon petitioner. The convictions and death sentences were affirmed by the Florida Supreme Court on October 4, 1984, and petitioner's motion for rehearing was denied (in light of revised opinion) on January 17, 1985.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In his brief on direct appeal, petitioner raised five issues; three of these related directly to the prejudicial pre-trial publicity. Petitioner contended that his right to a fair and impartial jury, secured by the Sixth and Fourteenth Amendments, was abridged (1) by the denial of his motion for change of venue [see Appendix F 22-42; G 1-5], (2) by the denial of his motion for individual and sequestered voir dire [see Appendix F 43-50, 38-42; G 6-8], and (3) by the denial of his challenge for cause to a prospective juror who acknowledged that she had already more or less made up her mind about the case from the news media accounts [see Appendix F 50-57; G 9-12]. The Florida Supreme Court rejected each of petitioner's contentions on the merits. Davis v. State, 461 So.2d 67, 69-70 (Fla. 1984)[The nature and content of the publicity was neither set forth nor discussed in the opinion]. In this petition for certiorari, after consideration of the criteria governing review on certiorari set forth in Supreme Court Rule 17.1(b), petitioner (through undersigned counsel) has decided to address only the issue regarding individual and sequestered voir dire.[1]

[1] In an excess of caution (made necessary by the State of Florida's demonstrated propensity for interposing frivolous "procedural default" objections in order to frustrate federal habeas corpus review), petitioner wishes to make it absolutely clear that he is not waiving his remaining constitutional claims, nor should his decision to focus this petition for certiorari on the one issue be construed as an implicit denigration of the other claims. The decision to emphasize a single issue in this case was necessitated by Supreme Court Rule 21.4 (maximum page limitation of 30); while the selection of the individual and sequestered voir dire issue as the one to emphasize was based on Rule 17.1(b).

## REASONS FOR GRANTING WRIT

### QUESTION PRESENTED

IN LIGHT OF THE EXTENSIVE AND HIGHLY PREJUDICIAL PRE-TRIAL MEDIA COVERAGE OF THIS CASE, AND IN LIGHT OF THE FACT THAT A SUBSTANTIAL NUMBER OF JURORS ACKNOWLEDGED HAVING BEEN EXPOSED TO THE PUBLICITY, THE TRIAL COURT'S REFUSAL TO PERMIT COUNSEL TO QUESTION PROSPECTIVE JURORS INDIVIDUALLY AND OUTSIDE OF ONE ANOTHER'S PRESENCE, IN ORDER TO DETERMINE WHAT IN PARTICULAR EACH JUROR HAD HEARD OR READ ABOUT THE CASE, DEPRIVED PETITIONER OF HIS RIGHT, SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS, TO BE TRIED BY A FAIR AND IMPARTIAL JURY.

### THE NATURE OF THE PRE-TRIAL PUBLICITY

Petitioner was placed under arrest for the Weiler murders in the early morning of May 13, 1982. The probable cause statement in the arrest report includes the following remarks:

> Allen Lee Davis admitts (sic) being at the victims home at approx. time of their death, 8 P.M. 11 May 1982. Allen Lee Davis failed a polygraph examination conducted by the Jax. Sheriff's Office.

Petitioner's motion for change of venue contained, inter alia, allegations that "[the] State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, that Allen Lee Davis was arrested after he failed a polygraph examination", and also improperly disclosed petitioner's inculpatory statements placing himself at the scene of the murders, improperly disclosed petitioner's prior criminal record and the fact that he was on felony parole at the time of his arrest, and improperly released ex parte statements of incriminating evidence which the police investigation had uncovered. [See Appendix E]. Appended to the motion was an affidavit of Assistant Public Defender Anthony Zebouni, stating that he personally observed Sheriff's Office employees tendering copies of the arrest report, which contained references to petitioner's having failed a polygraph and to his statements placing him in the Weiler home, to television and radio personnel at petitioner's bond hearing. Also included were affidavits of fifteen Duval County attorneys, who stated their opinions that petitioner could not obtain a fair and impartial jury in the county as a result of extensive newspaper publicity and T.V. and radio coverage of the case, and specifically the exposure of members of the community to the inadmissible evidence of petitioner's having

failed a polygraph examination, and his prior record of violent crime, and to the dissemination of statements concerning petitioner's presence at the crime scene at the time of the offense.

At the hearing on the motion for change of venue, the defense introduced an audit report showing the daily circulation of the Jacksonville newspapers. These figures were: Times-Union-115,666; Journal-43,600; Saturday-132,279; Sunday-146,423. The Jacksonville Journal of May 13, 1982, contained an article headlined "Suspect charged in triple murder", which included a photograph of police and funeral home employees removing the bodies of Mrs. Weiler and her daughters from their home. The article stated, inter alia:

> Police said records indicate Davis, a shipyard welder, was arrested in 1965 at Bangor, Maine, for assault and in 1966 in Baltimore, Md., for involuntary manslaughter with a vehicle.
>
> Duval County Circuit Court records show he was sentenced to a total of 15 years here in 1973 after being convicted of two robberies and an attempted robbery. It could not be determined today if Davis served any time in prison on those convictions.
>
> . . .
>
> The suspect agreed to take a lie detector test and failed it, officers said. They declined to reveal the test questions.
>
> Homicide Detective Charles Kesinger said Davis told him he had seen Mrs. Weiler early Tuesday evening, the time members of the Duval County Medical Examiner's Office believe the killings occurred.

The Journal of May 13, 1982, also contained an article headlined "Explaining girl's slaying a tough job for teacher." The article dealt with the trauma faced by Kristy Weiler's fifth grade teacher, in breaking the news of Kristy's murder to her classmates. It read, in part:

> Kristina, who was called "Kristy", was a bouncy, "cheerleader type" who enjoyed doing handicrafts with her mother, Ms. Robichaud said. She had been selected by her classmates as the March "Supercitizen", said school Principal Marilyn Duncan.
>
> Yesterday would have been Kristy's 10th birthday. She had planned a birthday party at her home after school, and her class was taking a field trip to the zoo.
>
> "They were having a disco party for her birthday. The invitations were so cute, she wrote them herself and said, 'Be sure to wear your disco clothes,' Eddie (a classmate) was so upset because he forgot his dancing shoes," Ms. Robichaud said.

> "We did not tell that Kristy was the one that died," Mrs. Duncan said, adding that the children were told the birthday party had been canceled because of a death in the family "so these children wouldn't go over and run right into the tragedy and all that would be connected with it."
>
> Ms. Robichaud said Kristy's classmates did not seem satisfied with the explanation.
>
> "They wanted to know who had died and I said, 'I don't know.' They wanted to know if the party would be held.
>
> "They said, "Why is your nose so red? Why have you been crying? They know something is wrong, and I hope the parents are understanding about it. I feel sorry for those parents," Ms. Robichaud said.
>
> But she knows she will have to do some explaining to her class today.
>
> "I'm going to be very honest with them. They're going to be very scared, horribly scared. They're going to want comforting and they're going to want to know why it happened.
>
> "I'm going to try to make it a normal day...with a lot of silent meditation."

The Times-Union of May 13, 1982, reported the reaction of Dr. Bonafacio Floro, the assistant medical examiner:

> When Floro left the house yesterday afternoon, he wiped tears from his eyes and brushed aside reporters' questions until he had made a preliminary examination.
>
> He was visibly shaken.
>
> "It was because there were kids involved and the way they were killed," Floro, himself the father of three children, a girl, 12, and two boys, 4 and 7, said later.
>
> "You get emotional for anybody who had kids that died. They're so innocent; they did not know what was going on," he said.

The Times-Union of May 14, 1982, contained an article headlined "Welder held in slayings of mother, 2 daughters," featuring a large photograph of petitioner in handcuffs. The story begins, "A 37-year old welder who was paroled from prison in 1979 ..." Petitioner is described as a 6-foot 340-pound individual nicknamed "Tiny". The article continues:

> Circuit Court records showed that Davis pleaded guilty in 1973 to armed robbery, attempted armed robbery and carrying a concealed firearm, and that Circuit Judge R. Hudson Oliff sentenced him to 15 years in prison.

Davis was paroled Sept. 25, 1979, after serving most of the six years at Doctors Inlet Road Prison in Clay County, said David Skipper, a spokesman for the state Department of Corrections in Tallahassee.

He was paroled because he had a clean disciplinary record, good progress reports and showed a favorable prison adjustment, Skipper said.

Court officials said Davis also was convicted in 1966 in Baltimore of involuntary vehicular manslaughter for which he was sentenced to three years.

And in 1961, Davis was convicted in Bangor, Maine, of assault and battery and was sentenced to six months to three years.

. . .

Davis came under suspicion about eight hours after the bodies were found at 11 a.m. Wednesday, police said.

He was questioned by homicide detectives Wednesday night and voluntarily submitted to a lie-detector test, said homicide Lt. Jim Suber. He was arrested and booked about 2 a.m. yesterday.

Davis' pickup truck, which was found near the Weilers' house, was examined for physical evidence.

"We got this thing under heavy investigation," Suber said yesterday. "We're trying right now to tie some loose ends. We haven't found the gun, and we can't comment on the evidence we have."

On May 18, 1982, the Jacksonville Journal published an article headlined "Alligator impedes probe." This article concerned police efforts to recover the murder weapon, a pistol. Divers were searching several bodies of water, and there were apparently alligators in the locations being searched. Homicide detectives said they didn't know anything about alligators:

"I'm not verifying the information," Lt. Jim Suber said. "We're searching four or five bodies of water. This is just one more place."

Suber said any comments could hinder the investigation and that if anything were printed, a guard would be placed in the area being searched to prevent anyone from tampering with evidence that might be found there.

"Whoever knows where that gun is, knows where the water is" he said.

"You can never know for sure what people will do."

Suber said his fears were not that another suspect might be at large, but that relatives or friends of Allen Lee Davis, the 37-year old shipyard welder charged with the triple slayings could try to prevent investigators from discovering evidence.

The defense called as a witness Steven Crosby, assistant news director at WJXT Television, Channel 4, who presented "doves" (video

taped segments which appeared on the air)from newscasts concerning the Weiler murders. One of these newscasts announced:

> Thirty-seven-year-old Allen Lee Davis booked into the Duval County Jail early this morning; he's charged with triple murders of Nancy Weiler and her two children, ten-year-old Christina and five-year-old Kathy.
>
> Early in the investigation, attention focused on this man, Allen Lee Davis, the son of the Weiler's next-door neighbor. After questioning Davis, police found substantial evidence in both the suspect's truck and, upon investigation of the house, linking him to the crime.
>
> He was in the presence of the victims at the time of their death and he admits to this and he has also failed the polygraph test.
>
> According to the police, Davis agreed to be interviewed at the Jacksonville Sheriff's Office. This is not his first brush with the law. Police say he was out on parole and has a lengthy criminal record. He is scheduled to be arraigned later this morning.
>
> Jeff Silverstein, Channel 4, Eyewitness news.

Other channel 4 broadcasts carried the following information and commentary:

> The neighborhood in this community is a very close-knit group. The only word is horrible. That is the only word. Things like this don't happen in a nice neighborhood and this is a nice neighborhood and they were nice people.
>
> Twelve-year-old blank blank was invited to the birthday party planned for Cristina. She would have been ten years old. I got of of the bus and I didn't want to believe it at first. It's kind of senseless but I found out it was a crime.
>
> . . .
>
> The crime was called untimely. He is the son of the of the Weilers' next-door neighbor. Police say they found cord similar to that used to bind the wrists of the Weiler child in the Chevrolet pickup. They say his handgun is missing and has not yet been found. Davis today has been charged with murder at 3:00 o'clock this morning, after he flunked a lie detector test. Davis had already been convicted of assault and disorderly conduct. He was out on parole for armed robbery. Fellow shipyard workers and friends give a completely different picture of Davis. They say he is a good natured man who loves children, a good co-worker. They say they can't believe he is a man who could be guilty of committing three murders.
>
> Bill Palmer worked with Davis two years says he's okay, he loved to sit down and talk about hunting, fishing and back in Maine, that's where he's from. I can't believe that this happend. I can't believe it's true. I am sick about this whole thing. Since leaving the North Florida Shipyard in the fall, friends say Davis worked in other shipyards. They say he was laid off a few weeks ago. Davis shared his Arlington apartment with Mary Collins. It's unbelievable. I can't believe it. I really can't. Especially when

it comes to children, I can't believe he would do something like that. I really don't believe he did it.

John Weiler is staying with friends after flying back from Pittsburgh yesterday. He said he is trying to make funeral arrangements for his family so brutally taken away from him.

Wynn Farley, Channel 4 Eyewitness News.

. . .

There might have been some doubt in people's minds, there was no doubt in our mind now that we have the right suspect. Lt. Suber would not comment on the circumstances but here's what we know of evidence from the individuals close to the investigation: During several hours of questioning in the interrogation room, the police said Davis told them he was in the Weiler home the night of the murders but also said he had a lapse of memory. The detective that made up the arrest report wrote Allen Davis stated he could not remember everything that happend while he was at the victims' home.

The Duval County Medical Examiner put the time of death somewhere between 7:30 and 9:00 o'clock. John Weiler told police he talked with his wife on the phone at a quarter of 7:00 while she was preparing dinner.

A neighbor said she called the Weiler home at 8:15 and there was no answer. Davis, himself, told the police he was in the house around 8:00 o'cock. Police first questioned Davis as a possible suspect witness when his father, the Weiler's next-door neighbor, reported his gun missing.

The police believe the gun to be the same kind that the suspect used. They think it was a .357 caliber revolver like this one as fragments of the wood from the murder weapon were found by the victims which were pistol whipped.

Sources close to the investigation say the pistol was a Black Hawk .357 Magnum. The insignia was all that was found at the scene that would make it the same type gun Davis' father reported missing. The whereabouts of the actual murder weapon remains a mystery.

Among evidence taken from the truck was nylon cord believed to be identical to one of the cords used to tie up one of the children. Detectives secured the scene at the time and Davis' apartment, looking for physical evidence. Their findings were brought here to the Jacksonville Crime Lab where they will look for fibers, hair and do ballistic tests.

I think we have a very significant case against him at this point and I hope to have even a better case at trial time based on physical evidence and witnesses. Davis' attorney said he will ask the Court to move the case out of Jacksonvile. We predict it will be a very sensitive case.

Denny Silverstein, Channel 4 Eyewitness news.

The video tape next depicted petitioner, handcuffed, wearing

a baseball cap, and flanked by two officers, apparently being transported to the Duval County Jail during the night time.

The Channel 4 stories concerning the Weiler murders were aired at noon, 6:00 p.m., and 11:00 p.m., and some may have appeared on more than one newscast. According to an Arbitron survey covering the period from April 28 - May 25, 1982, Channel 4 News had a potential weekday viewing audience[2] of 55,000 households or 72,000 persons for the noon broadcast, 109,000 households or 174,000 persons for the 6:00 p.m. broadcast, and 56,000 households or 92,000 persons for the 11:00 p.m. broadcast. Crosby indicated that this survey would include Duval County, and the surrounding counties of Baker, Bradford, Clay, Columbia, Nassau, and Putnam.[3]

Gerry Howard, news director of WJKS-TV, Channel 17, presented four taped news broadcasts concerning the Weiler murders. He estimated that, altogether, these stories would have been aired a dozen or more times. The third newscast, which was aired on May 13, 1982, at 6:00 p.m., again at 11:00 p.m., and on Newswatch 17 update the following morning, related the following information:

> Davis was charged with the murders early this morning after four hours of interrogation. Police said he voluntarily submitted to a lie detector test and failed. Other evidence includes rope found in the back of pickup which may have been used to tie the hands of Kathy Weiler who was found shot to death. Police say Davis who was denied bond admitted being in the house around 8:00 p.m. Wednesday night.
>
> Davis had been convicted twice and released from Raiford in 1969.[4]
>
> (T 162).

. . .

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[2] Crosby defined his "potential viewing audience" as the number of households which, there would be good reason to believe, would have television sets tuned to Channel 4 WJXT at a particular time.

[3] The population of Duval County, according to the 1980 census, was 570,981. The combined population of the six other counties was 221,206. According to voter registration statistics submitted by the defense, there were 251,304 registered voters (and therefore 251,304 potential jurors) in Duval County as of August 4, 1982.

[4] This date is incorrect. Davis was paroled from the Florida prison system in 1979. The child whose hands were bound was Kristy Weiler.

> Richard Padden[5] said he had spoken to Davis around 6:00 p.m. Tuesday night just about two hours before the murders were committed. He shook my hand and told me any time I needed anything, give him a holler. Did he indicate to you why he was in such a good mood? No. Looked like to me he had been out working. Police are searching the waters in back of the Weiler home in hopes of finding the murder weapon.

Howard indicated that approximately 20,000 people see the 6:00 p.m. newscast on Channel 17, and approximately 19,000 people see the 11:00 p.m. newscast, Channel 17's signal encompasses a five-county area, including Duval, Clay, St. John's, Baker, and Flagler.[6]

Irene Shubert, administrative assistant to the news desk at WTLV-TV Channel 12, presented several video taped news segments on the Weiler murders. The first story was aired at noon on May 12, 1982, and included the following comment (which was repeated during the 6:00 p.m. broadcast):

> The neighbors were in total shock, completely wiped out. We never had anything happen before like this. I have been in the Military but not next door -- the murders came on the morning eve of the celebration that was the birthday of nine-year-old Christy Weiler.

Another Channel 12 newscast, apparently aired on June 9, 1982, (see T-173) conveyed the following information to viewers:

> ... there were not just three deaths on May 11. Mrs. Weiler was pregant at the time. The pregnancy is early and it is unlikely another murder charge will result.
>
> The police now have three witnesses that can pin down Davis' whereabouts on the day of the murders. One neighbor apparently spotted Davis near where the murders occurred with a gun in his hand. Neither the police nor the Public Defender or prosecutor would have any comment or action.
>
> Assistant State Attorney Ralph Greene would not comment on Davis' case but he would talk about the use of hypnosis testimony in court. We're not talking about hocus pocus, you know, of a carnival show; it's well recognized, well thought of technique to help a person remember.
>
> But the case against the unemployed shipyard worker is growing more complicated, one that the defense feels would have to be decided outside of Duval County.

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[5] Richard Padon testified at trial that he drove Davis to Davis' father's house to commit a burglary in the neighborhood; that he later picked Davis up; and that Davis had three brown paper bags, one of which contained a Nikon camera. Padon did not mention any of this to police until September, because he did not want to get involved.

[6] The combined 1980 population of the four surrounding counties is 144,557, compared to Duval's 570,981.

In July, 1982, Channel 12 broadcast an editorial piece by Allen Rothstein:

> The murder occurred while Davis was out on parole. Allen Lee Davis is accused of killing a Jacksonville mother and her two children while out on parole for armed robbery this year. I think that he needed to serve a little more time than three years. I mean, that was a child that he first killed. He was in court today trying to stop the prosecution from using an alleged conviction but he has not yet been tried for the second trial -- (inaudible) parole and probation people are letting people out on the streets too early, that he's got a criminal out there on the street.
>
> Mistakes are made but -- we cannot predict what a person will or will not do. We try to make the best judgment we can based on the information that we have (inaudible). Why should I agonize over a sentence if they're going to take them over there in due time and re-sentence them, why don't we try them and say you all do what you want to with them?
>
> Channel 12, Allen Rothstein.

According to an Arbitron survey, there are 169,000 households in the WTLV viewing area. The estimated viewing audiences for the news broadcasts are: Good Morning, Jacksonville - 10,000 households; noon - 15,000; 6:00 p.m. - 40,000; and 11:00 p.m. - 33,000. Stories are sometimes broadcast on more than one news program. The station's major market is Duval County; its signal reaches into south Georgia and Clay, Nassau, and Baker Counties.[7]

Summarizing the evidence in support of his motion for change of venue, defense counsel asserted that the pre-trial media coverage of this case was irreparably prejudicial in that it exposed the Duval County community to 1) inadmissible evidence of petitioner's prior criminal record including convictions of manslaughter, two armed robberies, and attempted robbery; 2) inadmissible evidence that petitioner was on parole at the time of the murders; 3) inadmissible evidence that petitioner took a polygraph and failed it; 4) petitioner's statements (the admissibility of which had yet to be determined) to police, placing him in the Weiler home at the time the medical examiner believed the murders occurred, and claiming that he had a lapse of memory while in the house; 5) ex parte statements of evidence indicative of guilt which the police had assembled, including the facts that a handgun belonging to petitioner's father was missing, that a cord found in petitioner's truck matched the cord which bound Kristy Weiler's wrists (T 186, 187), and that police

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[7] The combined population of the latter three counties is 115,235.

had found three eyewitnesses who could pin down petitioner's whereabouts, one of whom saw him in the neighborhood with a gun in his hand; 6) statements by state officials expressing their certainty of petitioner's guilt; that they had the right suspect, and that they had a "very significant case" aainst him; 7) statements by police to the effect that petitioner's friends or relatives might interfere with their efforts to find evidence; specifically the missing handgun; 8) inflammatory commentary strongly tending to evoke community sympathy for, and identification with, the victims (and, concomitantly, prejudice against the named suspect, Davis), including an article about Kristy's schoolteacher having to break the news of her death to her classmates, newscasts emphasizing the reaction of the Weilers' close-knit, uppermiddle class, family-oriented neighborhood to the horror and senselessness of the crime; references to Mrs. Weiler's being pregnant at the time of her death; references to Kristy's tenth birthday party which was to have been held the next day, and the medical examiner's emotional reaction as he left the house ; and 9) a telecast denouncing parole authorities for releasing prisoners back onto the streets to commit crimes, and referring specifically to petitioner as one who "needed to serve a little more time" and who subsequently murdered a child.

Jury selection commenced on January 31, 1983. Defense counsel called the trial court's attention to the pending motion for individual and sequestered voir dire, which the court then denied. During voir dire, at least ten prospective jurors[8] acknowledged that they had some prior knowledge of the case, from television, radio, newspapers, or word of mouth. As a result of the group voir dire, however, it was not possible to ascertain specifically <u>what</u> each of these jurors had heard or read about the case without contaminating the remainder of the venire. Early in the voir dire, a prospective juror (unidentified in the record) said, "I must honestly say I read the paper rather thoroughly..." and indicated that he was not sure at that point if he

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[8] These prospective jurors included Richardson, Lane, Stanley Johnson, Jackson, Cassidy, Griswold, James Johnson, Robb, Price and Arceneaux.

could be open-minded or not. A second unidentified prospective juror said the same applied to her. Prospective juror Lane said she knew about the case from watching television, knew in her heart how she felt about it, and had already more or less made up her mind [see Appendix F 50-57, G 4-12]. Prospective juror Richardson (who served on the jury) stated that she knew something about the case from the newspaper and TV. Prospective juror Price, who had heard something about the case, when asked by the prosecutor whether she could vote for the death penalty, stated:

> Well, the way it was expressed to me, sir, these people get out on probation and they done these horrible things, that's the only question that I would say about capital punishment.

Four of the ten prospective jurors who acknowledged having been exposed to the media coverage - Richardson, Jackson, Griswold, and Arceneaux - ultimately served on the jury which convicted petitioner and recommended imposition of the death penalty.

> The Trial Court's Refusal to Permit Counsel to Question Prospective Jurors Individually and Outside of One Another's Presence, in Order to Determine What in Particular Each Juror had Heard or Read About the Case, Deprived Petitioner of his Right to be Tried by a Fair and Impartial Jury.

In his concurring opinion (joined by Justices Stewart and Marshall) in Nebraska Press Association v. Stuart, 427 U.S. 539, 602, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), Justice Brennan observed that, in order to protect the Sixth and Fourteenth Amendment rights of the accused in a case where there has been incriminating publicity:

> ...the trial judge should employ the voir dire to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt. See, e.g., Hamm v. South Carolina, 409 U.S. 524, 531-534 (1973) (opinion of Marshall, J.); Swain v. Alabama,, 380 U.S. 202, 209-222 (1965). Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover facts that would dictate disqualification for cause. Indeed, it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating

unbiased members of the venire when other members disclose prior knowledge of prejudicial information.

Although a trial court has broad discretion in its conduct of voir dire, this discretion is limited by the requirements of due process. United States v. Hawkins, 658 F.2d 279, 283 (5th Cir. 1981); United States v. Gerald, 624 F.2d 1291, 1296 (5th Cir. 1980). See also United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976) (exercise of trial court's discretion in conduct of voir dire is limited by "essential demands of fairness"). In order to satisfy the requirements of due process, the method of voir dire adopted by the trial court must be capable of giving reasonable assurance that prejudice would be discovered if present. United States v. Hawkins, supra, at 283, 285; United States v. Gerald, supra, at 1296; United States v. Nell, supra at 1229; United States v. Chagra, 669 F.2d 241, 253 (5th Cir. 1982). In view of the volume of prejudicial publicity and pre-trial disclosure of inadmissible evidence in the present case, the trial court's ruling, and the consequent examination of the prospective jurors in each other's presence, virtually guaranteed that any prejudice created by the publicity would not be discovered.

The Fifth Circuit Court of Appeals has recognized that where the nature of the pre-trial publicity as a whole raises a significant possibility of prejudice, and where one or more jurors acknowledge some exposure to that publicity, the trial court must determine, at minimum, what in particular each juror had heard or read and how it affected his attitude toward the trial. United States v. Hawkins, 658 F.2d 279, 282-85 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 196-98 (5th Cir. 1978). Hawkins and Davis stop short of requiring individual or small group voir dire in every case in which there has been publicity. The Hawkins opinion distinguishes a prior decision as follows:

> In United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980), fifteen of twenty-eight prospective jurors were exposed to pretrial publicity. Although this Court reaffirmed the principle stated in Davis that cursory questioning of the jury is not enough when the nature of the publicity as a whole, together with the surrounding circumstances, raises a significant possibility of prejudice, we noted that, unlike Davis, the record in Gerald was "completely devoid of any indicators of the nature and extent of pretrial publi-

> city ...." 624 F.2d at 1297. Consequently, this Court held that defendant's failure in Gerald to "direct the trial court's attention to specific news items so the trial court [could] make an initial determination of whether the information is prejudicial," 624 F.2d at 1298, defeated his claim that the district court erred in failing to adhere to the strict requirements of Davis:
>
> > The time consuming, probing, preferably individual voir dire described in Davis generally is not required in cases involving unsupported general allegations of prejudicial pretrial publicity or in cases where the publicity does not create a significant potential of prejudice.
>
> United States v. Hawkins, supra, at 284.

To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pre-trial publicity. Gannett Co. v. DePasquale, 443 U.S. 368, 378, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). It is well recognized that where a juror has been exposed to prejudicial publicity, his assurances that he can nevertheless be impartial and give the defendant a fair trial are not necessarily dispositive. Sheppard v. Maxwell, 384 U.S. 333, 351, 86 S.Ct. 1507, 16 L.Ed. 600 (1966). It is the responsibility of the trial court, not the juror himself, to make the ultimate determination of whether his impartiality has been impaired. United States v. Hawkins, supra; United States v. Davis, supra. Because the attorneys and the court in the present case were unable to determine what each juror had heard or read, the trial court was unable to fulfill this constitutional responsibility. See United States v. Hawkins, supra; United States v. Davis, supra.

In State v. Stiltner, 491 P.2d 1043 (Wash. 1971) (in which the media had revealed that the defendant, alone among the five suspects, had not taken and passed a polygrah), the Supreme Court of Washington recognized the "Catch-22" faced by defense counsel in trying the ferret out the prejudice created by pre-trial disclosure of inadmissible material. The trial judge in Stiltner had said:

> Now this court recognizes the dilemma that Mr. Roy [defense consel] is put in this matter and should comment, it seems to me, at this point. He is in a position where he must ask a juror whether or not he remembers a certain thing that he doesn't want him to remember and by doing so he may quicken or refresh that memory as to a newspaper article that may otherwise have been forgotten.

State v. Stiltner, supra, at 1048.

In the present case, counsel obviously could not ask a prospective juror if he had read or heard that petitioner failed a polygraph, or admitted being in the Weilers' home, or had served time for several armed robberies, without conveying to the juror and the rest of the venire the very information they hopefully did not know. But if counsel had been permitted to examine the prospective jurors outside one another's presence, then at least he could have asked each juror what he knew about the case without running the risk of the juror's honest answer contaminating the entire venire. With so much inadmissible evidence let loose in the community before trial, and with at least ten prospective jurors admitting to some exposure to the publicity, the chances of something like this occurring were excellent. So neither the attorneys nor the court ever determined the nature or extent of the extrajudicial knowledge which these prospective jurors brought with them to court. Indeed, the prosecutor on several occasions specifically cautioned jurors that he did not want them to reveal the specifics of what they had read or heard, but only whether they thought it would interfere with their ability to be impartial.

In State v. Goodson, 412 So.2d 1077 (La. 1982), the Supreme Court of Louisiana concluded that the defendant had failed to establish that the publicity in his case was of such a character as to create a presumption of prejudice which would require a change of venue without regard to voir dire. With respect to actual prejudice, the court noted that, as there had not yet been a voir dire examination, it was impossible to determine whether it existed or not. The court remanded the case to the trial court with instructions to defer ruling on a change of venue until completion of voir dire. Because serious questions of potentially prejudicial publicity were involved, the court further instructed the trial court that the voir dire should be conducted according to the following guidelines, based upon Section 8-3.5, American Bar Association Standards Relating to Fair Trial and Free Press:

> Since there is a significant possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the

> examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.
>
> Both the degree of exposure and the prospective juror's testimony as to state of mind are relevant to the determination of acceptability. A prospective juror testifying to an inability to overcome preconceptions shall be subject to challenge for cause no matter how slight the exposure. If the prospective juror remembers information that will be developed in the course of the trial, or that may be inadmissible but does not create a substantial risk of impairing judgment, that person's acceptability shall turn on the credibility of testimony as to impartiality. If the formation of an opinion is admitted, the prospective juror shall be subject to challenge for cause unless the examination shows unequivocally the capacity to be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.
>
> State v. Goodson, supra, at 1081.

Four of the people who served on appellant's jury acknowledged having some extrajudicial knowledge about the case. Considering the character of the pre-trial disclosures made by the police and the media, there is a distinct possibility that some of this knowledge was inadmissible in addition to being highly prejudicial; such knowledge on the part of a juror, if revealed on voir dire, would have made him subject to a challenge for cause. Yet the method of voir dire used in this case virtually ensured that such knowledge, if it existed, would not be revealed. Consequently, the trial court's denial of the defense's motion for individual and sequestered voir dire not only deprived appellant of due process [United States v. Hawkins, supra; United States v. Davis, supra], it also impaired, indeed effectively destroyed, his ability to exercise his challenges for cause and his peremptory challenges in a reasonably intelligent manner. See United States v. Rucker, 557 F.2d 1046, 1048 (4th Cir. 1977), in which the appellate court observed that "a defendant is

entitled to have sufficient information brought out on voir dire to enable him to exercise his challenges in a reasonably intelligent manner", and further stated:

> While the conduct of a voir dire examination is a matter within the broad discretion of the trial judge, Ristaino v. Ross, 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973); Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931), the exercise of that discretion is limited by "the essential demands of fairness." Aldridge, supra, at 310, 51 S.Ct. 470. A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice. Swain v. Alabama, supra, 380 U.S. at 219, 85 S.Ct. 824; United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972).
>
> United States v. Rucker, supra, at 1049.

See also United States v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977) ("... the real issue is whether the voir dire examination uncovers possible prejudice and bias of any juror so that a fair and impartial jury may be impaneled. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes").

As previously discussed, in order to satisfy the requirements of due process, the method of voir dire adopted by the trial court must be capable of giving reasonable assurance that prejudice would be discovered if present. United States v. Hawkins, supra, at 283, 285; United States v. Gerald, supra, at 1296; United States v. Nell, supra, at 1229; United States v. Chagra, 669 F.2d 241, 253 (5th Cir. 1982). In view of the inflammatory nature of the publicity in this case, and the extensive pre-trial disclosure of inadmissible facts, the trial court's refusal to allow counsel to question prospective jurors individually virtually guaranteed that any prejudice created by the publicity would not be discovered, unless the juror himself both recognized and admitted that he could not be impartial. And, as both this Court and the Florida Supreme Court have recognized, "it is difficult for any person to admit that he is incapable of being able to judge fairly and impartially." Singer v. State, 109 So.2d 7, 24 (Fla. 1959); see Irvin v. Dowd, 366 U.S. 717, 728, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Since it is the court, and not the individual juror, who must ultimately decide whether the juror's

impartiality has been impaired by his extrajudicial knowledge or his exposure to inflammatory publicity, the group voir dire employed in this case was constitutionally inadequate. United States v. Hawkins, supra; United States v. Davis, supra.

Supreme Court Rule 17.1, which sets forth the considerations governing review on certiorari, states, inter alia:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> . . .
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

In the present case, the decision of the Florida Supreme Court is in clear (albeit silent) conflict with the decisions of the Fifth Circuit Court of Appeals in United States v. Hawkins, supra, and United States v. Davis, supra, as well as the decision of the Supreme Court of Louisiana in State v. Goodson, supra. In petitioner's brief on appeal, he set forth in detail the inflammatory and prejudicial nature of the pre-trial publicity [see Appendix F 5-21], all of which had been presented to the trial court at the time he denied a change of venue and subsequently refused to allow individual voir dire. See United States v. Hawkins, supra; United States v. Davis, supra; contrast United States v. Gerald, supra. Petitioner relied heavily on the Hawkins and Davis decisions in his brief, and argued that under the circumstances of this case (as in the cited cases) the method of voir dire adopted by the trial court was incapable of giving reasonable assurance that prejudice would be discovered if present, and therefore deprived petitioner of his Sixth Amendment right to a fair and impartial jury. [See Appendix F 43-50, 36-42, G 6-8].

The Florida Supreme Court, without any reference to the nature or content of the pre-trial media coverage in this case, rejected petitioner's arguments without mentioning either Hawkins or Davis or the cosntitutional basis of the issue:

> Davis also claims that the trial court erred by failing

> to conduct individual and sequestered voir dire of the prospective jurors as requested by the defense. The granting of individual and sequestered voir dire is within the trial court's discretion. Stone v. State, 378 So.2d 765 (Fla. 1979), cert.denied, 49 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980); Jones v. State, 343 So.2d 921 (Fla. 3d DCA ), cet.denied, 352 So.2d 172 (Fla. 1977). The purpose of conducting voir dire is to secure an impartial jury. Lewis v. State, 377 So.2d 640 (Fla. 1979). Davis had demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to this claim.
>
> Davis v. State, 461 So.2d 67, 69-70 (1984)

In so holding, the Florida Supreme Court has misconstrued or ignored the entire prenise of petitioner's argument, and that of the Hawkins, Davis, and Goodson decisions, which is that the accused is unfairly deprived of an opportunity to "[demonstrate] ... the partiality of his jury" where prospective and sitting jurors have been exposed to inflammatory articles, editorials, and broadcasts containing inadmissible and highly prejudicial information, but where the method of voir dire adopted by the trial court precludes both counsel and the court itself from ascertaining what in particular each juror has heard or read.[9]

## CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

MICHAEL E. ALLEN
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SECOND JUDICIAL CIRCUIT

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Attorney for Petitioner

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[9] A final reason why certiorari review in the instant case is appropriate is that the decisions of the Fifth Circuit Court of Appeals in Hawkins and Davis are themselves arguably in conflict with the decision of the Sixth Circuit Court of Appeals in United States v. Blanton, 719 F.2d 815 (6th Cir. 1984) [See Supreme Court Rule 17.1(a)]. The original panel in Blanton had held (relying on Hawkins, Davis, and other decisions) that the group voir dire conducted by the trial court was constitutionally inadequate in light of the prejudicial publicity in the case, and had reversed for a new trial. 700 F.2d 298. The Sixth Circuit, considering the case en banc rejected the panel decision by a 6-4 vote, and affirmed the convictions without mention of Hawkins or Davis.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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ALLEN LEE DAVIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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APPENDIX

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MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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# APPENDIX

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Accordingly, we approve the district court decision.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., concur.

**Allen Lee DAVIS, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 63374.**

Supreme Court of Florida.

Oct. 4, 1984.

Rehearing Denied Jan. 17, 1985.

Defendant was convicted in the Circuit Court, Duval County, Major B. Harding, J., of three counts of murder, and he appealed. The Supreme Court held that: (1) trial court did not err in failing to grant motion for change of venue; (2) trial court did not err by failing to conduct individual and sequestered voir dire; and (3) evidence supported finding of five aggravating factors.

Affirmed.

Adkins, J., concurred in result only with the conviction and concurred with the sentence.

**1. Criminal Law ⇐115**

Trial court may wait to decide whether to grant change of venue until after attempt to seat jury is made.

**2. Criminal Law ⇐121, 1150**

Application for change of venue is addressed to court's sound discretion, and trial court's ruling will not be reversed absent palpable abuse of discretion.

**3. Criminal Law ⇐426(2)**

In prosecution for murder, trial court did not abuse its discretion by failing to grant defendant's motion for change of venue based on pretrial publicity where all who served on the jury indicated affirmatively that any prior knowledge could be put aside, that they could serve with open minds, and that they could reach a verdict based on the law and evidence presented at trial.

**4. Jury ⇐131(13)**

Granting of individual and sequestered voir dire of prospective jurors is within trial court's discretion.

**5. Jury ⇐131(1)**

Purpose of conducting voir dire is to secure impartial jury.

**6. Jury ⇐131(13)**

In prosecution for murder, trial court did not err by failing to conduct individual and sequestered voir dire of prospective jurors where there was no demonstration that jury selected was partial.

**7. Jury ⇐85**

Competency of challenged juror is mixed question of law and fact, determination of which is within trial court's discretion.

that even if the ordinance constituted a plan, the plan had to be completed before liability attached.

We find especially convincing the *Resnik* ra... that the duty to maintain arises because ... ry depends on those things a govern... ent has undertaken to ... Applying this to the oper...

*mercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979), citizens have a reasonable expectation that those things provided by the government as a result of its planning function may be relied upon to continue to operate because of operational-level maintenance.

**8. Criminal Law ⇐1158(3)**

Manifest error must be shown before trial court's ruling on competency of jurors will be disturbed on appeal.

**9. Jury ⇐97(4)**

In prosecution for murder, trial court did not err by failing to excuse prospective juror for cause where juror indicated that she could lay aside any bias or prejudice and render verdict solely upon evidence presented and instructions given.

**10. Criminal Law ⇐1086.10**

Trial court is encouraged to state on the record the reasons for granting or not granting challenge of juror for cause.

**11. Criminal Law ⇐388**

Unless both sides consent, results of polygraph examinations are inadmissible in adversarial proceedings.

**12. Criminal Law ⇐921**

Mere mention of possibility of polygraph examination does not compel granting of new trial.

**13. Criminal Law ⇐867**

In prosecution for murder, trial court did not err in denying defendant's motions for mistrial based on his father's testifying that defendant went with police to take a lie detector test where results of the test were not admitted and where court directed jury to disregard the reference.

**14. Criminal Law ⇐699, 1154**

Control of comments in closing arguments is within trial court's discretion, and court's ruling will not be overturned unless clear abuse is shown.

**15. Criminal Law ⇐1030(1)**

In absence of fundamental error, failure to object precludes consideration of points on appeal.

**16. Criminal Law ⇐1037.1(1)**

In prosecution for murder, any error in prosecutor's argument to the jury during the penalty phase was not preserved for review on appeal where defendant failed to object.

**17. Homicide ⇐354**

Imposition of three sentences of death on defendant convicted of three counts of murder was appropriate where, even though evidence was insufficient to support aggravating circumstance of avoiding or preventing arrest, evidence supported aggravating circumstances of heinous, atrocious, or cruel killings, premeditation, prior convictions, and attempted robbery. West's F.S.A. § 921.141.

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Steven L. Bolotin, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Andrew Thomas, Asst. Atty. Gen., Tallahassee, and Kathryn L. Sands, Asst. Atty. Gen., Jacksonville, for appellee.

PER CURIAM.

Allen Davis appeals his convictions of murder and sentences of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences.

The state charged Davis with three counts of first-degree murder for the shooting/beating deaths of a woman and her five- and ten-year-old daughters in their home. The jury convicted him as charged and recommended the death penalty for each conviction. The trial court agreed with the jury's recommendation and imposed three death sentences.

On appeal Davis claims: (a) the trial judge abused his discretion (1) by failing to grant a motion for change of venue, (2) by denying a motion for individual and sequestered voir dire, and (3) by denying a motion for mistrial based on a witness' testimony on redirect examination; (b) the trial judge erred in denying Davis' challenge for cause of one prospective juror; and (c) the prosecutor's closing argument rendered the penalty proceeding fundamentally unfair. After considering these points, we find that no relief is warranted. Moreover, our review of the record reveals that competent, substantial evidence supports the convic-

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1. A trial court may wait
grant a change of venue

tions and that the death sentences are appropriate.

[1] These murders occurred on May 11, 1982, the police arrested Davis on May 13, and a grand jury indicted him on May 27. On August 11, 1982 Davis filed a motion for change of venue, alleging that the case had received such extensive publicity that he could not receive a fair trial in Duval County. After a hearing on August 17, the trial judge deferred ruling on that motion until an attempt to select a jury had been made.[1] Jury selection subsequently began on January 31, 1983, with the trial lasting from February 1 through February 4.

[2] Davis now claims that the trial judge's failure to grant the motion for change of venue constituted an abuse of discretion. An application for change of venue is addressed to a court's sound discretion, and a trial court's ruling will not be reversed absent a palpable abuse of discretion. *Straight v. State*, 397 So.2d 903 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); *Manning v. State*, 378 So.2d 274 (Fla.1979). We find no such abuse here.

In *Manning* this Court reiterated the test for changing venue as set out in *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977). The Court went on to explain that in applying that test

> a determination must be made as to whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

378 So.2d at 276. The trial court ruled that Davis did not meet this test, and we agree.

[3] At the hearing Davis presented evidence detailing media coverage of the case. According to this evidence, the bulk of the publicity on the case appeared from mid May through early June 1982 with sporadic coverage after that. By the time for jury selection almost nine months had passed since the murders. Of the forty-some prospective jurors called several acknowledged having heard or read something concerning the case. Either the defense or the state used peremptory challenges to excuse some of these prospective jurors, but the final jury panel contained several persons who had some prior knowledge of the case. All who served on the jury, however, indicated affirmatively that any prior knowledge could be put aside, that they could serve with open minds, and that they could reach a verdict based on the law and the evidence presented at trial.

Media coverage and publicity are only to be expected when murder is committed. The critical question to be resolved, however, is not whether the prospective jurors possessed any knowledge of the case, but, rather, whether the knowledge they possessed created prejudice against Davis. *Straight*. Davis has not shown a community "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." *Manning*, 378 So.2d at 276. Moreover, following jury selection, Davis' attorney announced that he had consulted with Davis during the jury selection and that both he and Davis were satisfied with the jury selection even though they had one peremptory challenge left. On the facts presented here we find that the trial court did not abuse its discretion by failing to grant the motion for change of venue.

[4-6] Davis also claims that the trial court erred by failing to conduct individual and sequestered voir dire of the prospective jurors as requested by the defense. The granting of individual and sequestered voir dire is within the trial court's discretion. *Stone v. State*, 378 So.2d 765 (Fla. 1979), *cert. denied*, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980); *Jones v. State*, 343 So.2d 921 (Fla. 3d DCA), *cert. denied*, 352 So.2d 172 (Fla.1977). The purpose of

1. A trial court may wait to decide whether to grant change of venue until after an attempt to seat a jury is made. *Manning v. State*, 378 So.2d 274 (Fla.1979).

conducting voir dire is to secure an impartial jury. *Lewis v. State*, 377 So.2d 640 (Fla.1979). Davis has demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to this claim.

[7-9] As his last point dealing with the jury, Davis argues that the trial court erred by not excusing a certain prospective juror for cause. The competency of a challenged juror is a mixed question of law and fact, the determination of which is within the trial court's discretion. *Christopher v. State*, 407 So.2d 198 (Fla.1981), *cert. denied*, 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1982). Manifest error must be shown before a trial court's ruling will be disturbed on appeal. *Id.* "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.1984). The prospective juror in question met that test. When the defense challenged her for cause the court pointed out that "the last time you inquired of her, she said that she could listen to all of the evidence and render a verdict based on that, so I will deny your motion."

[10] Prospective jurors are frequently ambivalent, and their answers, as well as the questions asked of them, are, sometimes, not models of clarity. In such instances, as here, it can be argued that the words on the cold record have several meanings and are subject to several interpretations. It is of great assistance to an appellate court if a trial court states on the record the reasons for granting or not granting a challenge for cause, and we encourage trial courts to do so.

At trial the state called Davis' father to testify about a pistol missing from his home. The following exchange between the prosecutor and the witness occurred:

Q [Mr. Austin] While—did Allen subsequently leave with the police to go to the police station?

A [Donald Davis] Yes.

Q Do you know whether he did that freely and voluntarily or not?

A Yes, he did.

Q He did?

A I heard him tell [Detective] Kessinger, "Let's go take a lie detector test and get it over with."

Defense counsel then objected to the mention of a polygraph examination as being highly prejudicial and moved for a mistrial. After discussion, the trial court denied the motion and stated: "I don't think there is any prejudice. It was mentioned. There is no evidence that [a polygraph examination] was given and no evidence that there is [sic] any results." The court then directed the jury to disregard the witness' reference to a lie detector. Davis now claims that the trial court erred in denying his motion for a mistrial.

[11-13] Unless both sides consent, the results of polygraph examinations are inadmissible in adversarial proceedings. *Walsh v. State*, 418 So.2d 1000 (Fla.1982). Here, however, neither party sought to have any such results introduced. The mere mention of the possibility of a polygraph examination does not compel the granting of a new trial. *See Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). The trial court's cautionary instruction to the jury cured any problem with this witness' inadvertent reference to a polygraph examination, and we find no error on this point.

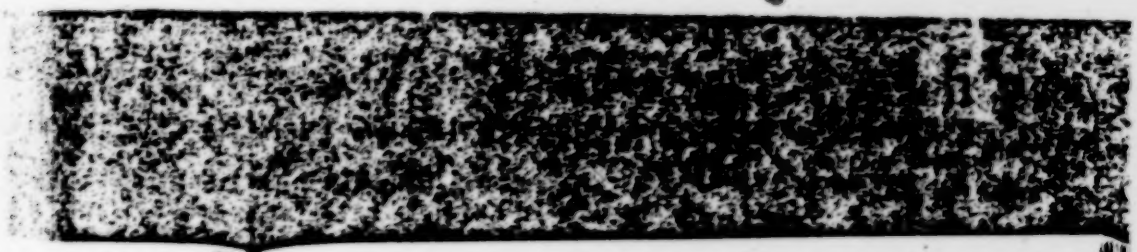
[14] As his final point on appeal, Davis contends that the prosecutor's argument to the jury during the penalty phase rendered those proceedings fundamentally unfair. After the jury charge, defense counsel objected to one of the prosecutor's remarks, an alleged "golden rule" comment. The court overruled the objection, finding that the manner and context of the remark did not constitute a "golden rule" argument. We agree. The control of comments in closing arguments is within a trial court's discretion, and a court's ruling will not be overturned unless a clear abuse is shown. *Teffeteller v. State*, 439 So.2d 840 (Fla.

1983), *cert. denied*, — 1430, 79 L.Ed.2d 75 showing has been ma

[15, 16] Defense c to the other comments appeal. In the absenc ror the failure to obje ation of this point on *State*, 449 So.2d 803 ( *State*, 438 So.2d 374 *nied*, — U.S. —, L.Ed.2d 725 (1984). D the comments constitu ror. This simply is no ments had no signifi jury's recommendation posed. They did not p of the conviction or se

Even if this prosecu been objected to then error committed by *State v. Murray*, 443 1984), we stated that alone does not warrant ... unless the errors u to a fair trial that they ed as harmless." We v the error must be so p the entire trial as judg error rule from *Chap* 386 U.S. 18, 87 S.Ct. (1967).[2] Wide latitude i ing to a jury. *Breed* So.2d 1 (Fla.), *cert. de* 103 S.Ct. 482, 74 L.Ed this case the prosecutor jury to recommend the we do not find that Our review of the recor prosecutor restricted h dence in the record and ments on that evidence. ally distinguishable fro 696 F.2d 940 (11th Cir. U.S. —, 103 S.Ct. 35 (1983), on which Davis ecutor pointed out, the and her two young child a terrible crime, and th

2. In *Chapman* the Court "court must be able to de





1983), *cert. denied*, — U.S. —, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). No such showing has been made here.

[15, 16] Defense counsel did not object to the other comments complained about on appeal. In the absence of fundamental error the failure to object precludes consideration of this point on appeal. *Bassett v. State*, 449 So.2d 803 (Fla.1984); *Mason v. State*, 438 So.2d 374 (Fla.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). Davis now claims that the comments constituted fundamental error. This simply is not correct. The comments had no significant impact on the jury's recommendation or the sentence imposed. They did not go to the foundation of the conviction or sentence.

Even if this prosecutor's argument had been objected to there was no reversible error committed by the argument. In *State v. Murray*, 443 So.2d 955, 956 (Fla. 1984), we stated that "prosecutorial error alone does not warrant automatic reversal ... unless the errors involved are so basic to a fair trial that they can never be treated as harmless." We went on to hold that the error must be so prejudicial as to taint the entire trial as judged by the harmless error rule from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[3] Wide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, 459 U.S. 1060, 103 S.Ct. 482, 74 L.Ed.2d 627 (1982). In this case the prosecutor strongly urged the jury to recommend the death penalty, but we do not find that he went overboard. Our review of the record discloses that the prosecutor restricted his argument to evidence in the record and to reasonable comments on that evidence. This case is factually distinguishable from *Hance v. Zant*, 696 F.2d 940 (11th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), on which Davis relies. As the prosecutor pointed out, the killing of a woman and her two young children in their home is a terrible crime, and the proof against Davis was substantial. We therefore find no merit to this point.

In his sentencing order the trial court found five aggravating factors (under sentence of imprisonment; previous conviction of violent felony; committed during course of a burglary; heinous, atrocious, or cruel; and cold, calculated, and premeditated) applicable to all three counts of the indictment plus one additional factor (avoid or prevent arrest) applicable to the younger daughter's death. The trial court found nothing in mitigation.

Davis' appellate attorney has not challenged the death sentences. In response to a question asked at oral argument he stated that he had made a tactical decision not to do so and gave several reasons for his decision. First, he said that, in all candor, only the cold, calculated, and premeditated and avoid or prevent arrest aggravating circumstances could be argued against. Moreover, because no mitigating circumstances existed and because the jury had recommended the death sentence, the sentence could be sustained even if this Court found those aggravating circumstances improper. *Elledge v. State*, 346 So.2d 998 (Fla.1977). Finally, defense counsel stated that, taking the above into consideration, he had decided to use his brief to attack the convictions rather than the sentences, even though he disagrees with the sentences.

[17] Section 921.141, Florida Statutes, however, directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion. Our review convinces us that all but one aggravating circumstance, avoid or prevent arrest, are supported by the record and that the trial court properly applied them to Davis. Davis had been convicted previously of several counts of robbery, attempted robbery, and use of a firearm during commission of a felony. At the time of these murders Davis was on parole from a fifteen-year prison sentence. Additionally, the person who had dropped Davis off so

3. In Chapman the Court held that a reviewing "court may ... declare a belief that [the error] was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. at 828.

that he could commit a burglary stated that when he picked Davis up again Davis had in his possession a camera of the same make as one belonging to the family of the victims which the victims' husband and father reported as missing after their deaths. The manner and method of these murders supports the finding of heinous, atrocious, or cruel—the mother had been beaten over the head with a pistol almost beyond recognition, one child was tied up and then shot twice, and the second child was shot once in the back and then beaten, all of which occurred in the mother's bedroom and the short hallway to that bedroom. *See Breedlove v. State.* The state's evidence is also sufficient to support the court's finding of cold, calculated, and premeditated in aggravation. *Compare Harris v. State,* 438 So.2d 787 (Fla.1983), *cert. denied,* — U.S. —, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984) (no evidence of planning, instruments of death all from victim's premises) with the instant case (entering home armed with pistol and with rope used to bind one of the victims). We do not find, however, that the evidence meets the standard of *Riley v. State,* 366 So.2d 19 (Fla.1978), and *Menendez v. State,* 368 So.2d 1278 (Fla.1979), and we therefore strike the court's finding of avoid or prevent arrest in aggravation of the younger child's murder.

In the sentencing order the trial court stated: "The Court finds that there are no statutory mitigating factors existent in this cause ...." The mitigating evidence was not restricted to that listed in section 921.-141, however, and we find the court's failure to mention nonstatutory mitigating evidence to be merely inartful drafting of the sentencing order.

Striking one of the aggravating circumstances leaves five valid ones for each count, with nothing in mitigation. We therefore affirm both the convictions and the sentences of death.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

ADKINS, J., concurs in result only with the conviction and concurs with the sentence.

J. Robert ROWE, Appellant,

v.

PINELLAS SPORTS AUTHORITY, et al., Appellees.

PINELLAS RESORT ORGANIZATION, INC., et al., Appellants,

v.

PINELLAS SPORTS AUTHORITY, et al., Appellees.

Nos. 65322, 65420.

Supreme Court of Florida.

Nov. 9, 1984.

Rehearing Denied Nov. 21, 1984.

Consolidated appeals were taken from a judgment of the Circuit Court, Pinellas County, James B. Sanderlin, J., which validated revenue bonds to be used to finance a sports stadium. The District Court of Appeal, Adkins, J., held that: (1) ordinance permitting use of tax revenues to secure revenue bonds issued for certain projects including sport stadiums complied with requirements of statute permitting counties to levy a tourist development tax; (2) Florida law does not require that every substantive provision of a proposed ordinance be reflected on a referendum ballot; all that is required is that the voters be given fair notice of the question to be decided; (3) since Pinellas Sports Authority charter was enacted by subsequent special act, the authority for pledging of tourist development tax revenues by county to secure obligations issued by the PSA controlled over any limitation imposed upon such a pledge by

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Affirmed.

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2. Administrative La
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3. Counties ⇐190(1)

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IN THE SUPREME COURT OF FLORIDA

| | | |
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| ALLEN LEE DAVIS, | : | |
| Appellant, | : | |
| v. | : | CASE NO. 63,374 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| | : | |

MOTION FOR REHEARING

Appellant, ALLEN LEE DAVIS, pursuant to Fla.R.App.P. 9.330(a), moves this Court for rehearing in the above-styled case, and as grounds therefor states:

1. Four of the five issues presented in appellant's brief - concerning his motion for change of venue, his motion for individual and sequestered voir dire, his challenge for cause to a juror who had "more or less' made up her mind about the case based on pre-trial publicity, and his motion for mistrial when a state witness referred to a lie detector test - were interrelated to one another, and each of these issues was directly related to the pre-trial publicity in the case. Appellant's arguments were not primarily based on the amount of publicity, but rather on the inherently prejudicial nature of the publicity, and the fact that, as a result of the trial court's rulings, it was never ascertained whether the ten potential jurors, or the four jurors who actually served, who acknowledged having been exposed to the publicity were aware of the inadmissible and highly prejudicial information revealed in the media (including the fact that appellant had taken and failed a lie detector test), or whether these jurors had been exposed to certain grossly inflammatory editorials, feature articles, and broadcasts (such as the Rothstein "piece" on TV channel 12, which denounced parole authorities for releasing prisoners back onto the streets to commit crimes, and referred specifically to Allen Davis as

Appendix B

one who "needed to serve a little more time" and who subsequently murdered a child. To briefly recapitulate, the media exposed the Duval County community to: 1) inadmissible evidence of Davis' prior criminal record, including convictions of manslaughter, two armed robberies, and attempted robbery; 2) inadmissible evidence that Davis was on parole at the time of the murders; 3) inadmissible evidence that Davis took a polygraph and failed it; 4) Davis' statements (the admissibility of which had yet to be determined) to police, placing him in the Weiler home at the time the medical examiner believed the murders occurred, and claiming that he had a lapse of memory while in the house; 5) ex parte statements of evidence indicative of guilt which the police had assembled, including the facts that a handgun belonging to Davis' father was missing, that a cord found in Davis' truck matched the cord which bound Kristy Weiler's wrists, and that police had found three eyewitnesses who could pin down Davis' whereabouts, one of whom saw him in the neighborhood with a gun in his hand; 6) statements by state officials expressing their certainty of Davis' guilt; that they had the right suspect, and that they had a "very significant case" against him; 7) statements by police to the effect that Davis' friends or relatives might interfere with their efforts to find evidence; specifically the missing handgun; 8) inflammatory commentary strongly tending to evoke community sympathy for, and identification with, the victims (and, concomitantly, prejudice against the named suspect, Davis), including an article about Kristy's schoolteacher having to break the news of her death to her classmates; newscasts emphasizing the reaction of the Weilers' close-knit, upper-middle class, family-oriented neighborhood to the horror and senselessness of the crime; references to Mrs. Weiler's being pregnant at the time of her death; references to Kristy's tenth birthday party which was to have been held the next day; and the medical examiner's emotional reaction as he left the house, and 9) the aforementioned

Rothstein "piece." See appellant's initial brief, p.7-18.

2. In its opinion affirming appellant's convictions and death sentences, this Court treats the four issues referred to above as if they had nothing whatsoever to do with one another. As to Issue IV, concerning the reference to a polygraph examination, the opinion states that "[t]he mere mention of the possibility of a polygraph examination does not compel the granting of a new trial," and quotes the trial judge's comment, in denying the motion for mistrial, "I don't think there is any prejudice. It was mentioned. There is no evidence that [a polygraph examination] was given and no evidence that there is [sic] any results." Nowhere in the opinion is there any reference to the fact that the news media (both daily newspapers and local network television) had revealed that appellant had taken and failed a polygraph examination nor is there any recognition of the possibility that, even if one or more of the jurors who had been exposed to the media coverage had forgotten about the lie detector test, the witness' comment could easily have refreshed their memories. As to the change of venue and individual and sequestered voir dire issues, the opinion concludes that the trial court did not abuse his discretion in denying these motions, without any discussion of the nature and content of the publicity complained of. In Copeland v. State, ___ So.2d ___ (Fla. 1984)(case no. 57,788, opinion filed September 13, 1984), decided less than a month before the opinion in the instant case was issued, this Court observed:

> In Murphy v. Florida, the United States Supreme Court said that a defendant might possibly raise a presumption of partiality by showing that the general atmosphere of the community is deeply hostile to him. Two ways to establish that such hostility exists are by showing that there was inflammatory publicity and by showing great difficulty in selecting a jury. Appellant here has failed to establish such hostility by either of these methods. As was the case in Murphy, the pretrial publicity here was largely factual, rather than emotional, in nature and mainly occurred around the time of the crime and the investigation, several months before the trial.

In the instant case, appellant's argument was directed almost exclusively to the first method of establishing community hostility, i.e. by showing that the media coverage was inflammatory and highly prejudicial. From a reading of the opinion, the natural assumption would be that since the Court did not see fit to discuss the content of the publicity, it must have been (as in Copeland and Murphy) "largely factual, rather than emotional, in nature." Yet, that is clearly not the case.

3. Undersigned counsel understands that he cannot dictate to this Court what facts to put in its opinion and what facts to leave out. However, a line of questioning which was pursued at oral argument in this case illustrates the problem which concerns him. Undersigned counsel was asked, "How was the publicity in this case worse than in Dobbert.[1]" Undersigned counsel could only reply to the effect that, "I don't know how the publicity was worse than in Dobbert, because the opinion in Dobbert doesn't indicate what the nature of the publicity was. All I can say is either that the publicity in Dobbert must not have been as prejudicial as in the instant case, or else, if it was as prejudicial, then Dobbert was wrongly decided." Several years from now, a lawyer from Miami or Tampa or somewhere may well be asked by this Court, "How was the publicity in your case worse than in Davis," and he will have to give the same lame answer. Appellant submits that the inherently prejudicial and inflammatory nature of the media coverage in this case, combined with the fact that at least ten prospective jurors and at least four actual jurors acknowledged exposure to it, necessitated a change of venue or, at the very minimum, an opportunity to question the jurors outside one another's presence. The trial court's denial of both of these motions violated appellant's constitutional right to a fair trial by an impartial jury.

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[1] Dobbert v. State, 328 So.2d 433 (Fla. 1976)

4. In its opinion, this Court said:

> Davis' appellate attorney has not challenged the death sentences. In response to a question asked at oral argument he stated that he had made a tactical decision not to do so and gave several reasons for his decision. First, he said that, in all candor, only the cold, calculated, and premeditated and avoid or prevent arrest aggravating circumstances could be argued against. Moreover, because no mitigating circumstances existed and because the jury had recommended the death sentence, death would still be the appropriate penalty even if this Court found those aggravating circumstances improper. Finally, defense counsel stated that, taking the above into consideration, he had decided to use his brief to attack the convictions rather than the sentences. We appreciate counsel's candor.

This statement is substantially correct, but it contains one misleading implication which deeply concerns undersigned counsel. What undersigned counsel stated at oral argument, in response to the court's inquiry, was that he made a tactical decision not to challenge any of the trial court's findings of aggravating circumstances because 1) only two of these findings could arguably be attacked and one of those (avoid arrest) applied to only one of the three death sentences; 2) the trial court found no mitigating circumstances, and there was no evidence from which it could be argued that a mitigating circumstance was established as a matter of law; and 3) since the jury recommended the death penalty and since there were no mitigating circumstances found, a challenge to the two arguably improper aggravating circumstances, even if successful, would be futile in that this Court could (and, in the undersigned's professional opinion, unquestionably would) apply the so-called "Elledge rule"[2] and affirm the death sentence based on the four remaining aggravating circumstances. Moreover, undersigned counsel concluded, on the basis of the U.S. Supreme Court's opinion in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed. 235 (1983), that a federal constitutional challenge to application of the "Elledge rule" would have no chance of success. Consequently, undersigned chose to concentrate his efforts on the

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[2] Elledge v. State, 346 So.2d 998 (Fla. 1977)

four issues relating to the conviction and to the fifth issue challenging the fundamental fairness of the penalty proceeding because of the prosecutor's repeated misconduct in closing argument.

Thus, it is true that undersigned counsel conceded that because no mitigating circumstances were found and because the jury had recommended death, then even if one aggravating circumstance (or, in one of the counts, two aggravating circumstances) was found improper, this Court would still affirm the death sentences, and could do so without violating existing law. Undersigned counsel did not concede, as the opinion seems to indicate, that "because no mitigating circumstances existed and because the jury had recommended the death sentence, death would still be the appropriate penalty even if the Court found those aggravating circumstances improper."

This is no mere semantic distinction. Undersigned counsel stands by his statement as actually made at oral argument as a legitimate tactical decision based on the current state of the law and on his assessment of the likelihood of a significant change in the law. However, if undersigned counsel, while representing a defendant in a capital case, had conceded that death was the appropriate penalty in the case (which undersigned did not say and does not believe), this would have been unethical and unprofessional conduct, not to mention grossly ineffective assistance of counsel. At least four of undersigned's colleagues at the Public Defender's Office, including Andrew Thomas, who was an Assistant Attorney General at the time and was undersigned's opponent in the oral argument of this case, were present at the oral argument, and each of them confirmed undersigned's recollection that he did not tell the Court that death was the appropriate penalty in this case. Consequently, undersigned counsel respectfully requests that this Court listen to the tape recording of the oral argument, and correct its opinion accordingly.

WHEREFORE, appellant respectfully requests that this motion for rehearing be granted.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, this 19 day of October, 1984.

STEVEN L. BOLOTIN
Assistant Public Defender

# Supreme Court of Florida

THURSDAY, JANUARY 17, 1985

ALLEN LEE DAVIS, **

Appellant, **

**

vs. ** CASE NO. 63,374

** Circuit Court Case No. 82-4752-CF Div. F
(Duval County)

STATE OF FLORIDA, **

Appellee. **

**

The Motion for Rehearing having been considered in light of the revised opinion is hereby denied.

JAN 21 1985
PUBLIC DEFENDER
2ND JUDICIAL CIRCUIT

A True Copy JB

TEST:

Sid J. White
Clerk Supreme Court.

cc: Hon. S. Morgan Slaughter, Clerk
Hon. Major B. Harding, Judge
Steven L. Bolotin, Esquire
Andrew Thomas, Esquire
Kathryn L. Sands, Esquire

State Attorney Numbe 82-29361

NCA: 6-9-82

IN T. . CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 82-4752 CF

DIVISION: R

STATE OF FLORIDA

vs

ALLEN LEE DAVIS

FILED

JUN 9 1982

CLERK - CIRCUIT COURT

MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE

The Defendant, ALLEN LEE DAVIS, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, respectfully moves this Honorable Court to order that prospective jurors in this cause be questioned in voir dire individually and out of the hearing of other prospective jurors, for the purpose of discerning their attitudes relating to capital punishment and their knowledge of the case based upon pre-trial publicity, and asserts the following grounds in support of this motion:

A. In order to obtain a fair and impartial jury, it is absolutely essential to inquire of each prospective juror about his knowledge of the offense, the parties, and the witnesses. It is necessary to inquire what the venireman's knowledge is and to ask questions to determine how that knowledge will affect his deliberations.

1. By explaining what he has heard about the charges or what he knows about parties or witnesses, a venireman may very likely impart his knowledge to the other prospective jurors unless there is individual, sequestered voir dire. Such knowledge, which is often based on opinion, rumors, hearsay, media coverage, and other sources of inadmissible evidence, can taint the entire venire that is exposed to it and serve to deny the Defendant a fair trial by an impartial jury. See Russ v. State, 95 So. 2d 594 (Fla. 1957); Moncur v. State, 262 So. 2d 688 (2 DCA 1972); Marrero v. State, 343 So. 2d 883 (2 DCA 1977); Kelly v. State, 371 So. 2d 162 (1 DCA 1979).

2. Whenever there is believed to be a significant possibility that individual talesman will be ineligible to serve because of exposure to potentially prejudicial material, the exar nation of each juror with respect to his exposure shall take place outside the presence of other chosen and propsective jurors. Standard No. 3.4, American Bar Association, Standards Relating to Fair Trial and Free Press; U.S. ex rel. Doggett v. Yeager, 472 F.2d 229 (3 CCA 1973)

B. Prospective jurors in capital cases are routinely questioned by the court, the prosecution, and the defense about their beliefs in the death penalty. Often, this questioning is of a repeated and prolonged nature. Such questioning about the death penalty in the presence of the other veniremen focuses attention on penalty before the defendant has been found guilty. As a result, some jurors may be more likely to believe that the defendant is guilty as charged. The influence of this procedure, however subtle, undermines the constitutional purpose and functioning of the jury in a criminal trial. "When the case is close, and the guilt or innocence of the defendant is not readily apparent, a properly functioning jury system will insure evaluation by the sense of the community and will also tend to insure accurate fact finding. Ballew v. Georgia, 98 S.Ct. 1029 (1978), at p. 1038.

1. Jurors undergoing death-qualification would have reason to infer that the judge and the attorneys personally believe the accused to be guilty or expect the jury to come to that conclusion. Only such an inference could serve to explain to the jurors why so much time and energy are devoted to an extensive discussion of penalty before trial. Provided with these cues from people who are not only experts in the courtroom but are also presumably acquainted with all the evidence in the case, the relevant law, and the "correct" application of the one to the other, death-qualified jurors may themselves become more inclined to believe that the accused is guilty as charged. Hovey v. Superior of Alameda County, 616 P.2d 1301 at 1348 (Cal. 1980).

2. If a juror is predisposed by the very process of the death-qualifying voir dire to believe the accused is guilty, the juror will tend, in consequence of that perspective: (1) to selectively perceive the evidence—e.g., "forgetting," distorting, or actually failing to perceive evidence which conflicts with his or her preconceptions; (2) to draw only those inferences from the evidence which supported those preconceptions and perhaps to "create" data to reinforce those beliefs; and (3) to evaluate the evidence perceived—e.g., assess credibility of witnesses, weigh the inferences drawn—in a manner which tends to fulfill his or her expectations. Moreover, a juror who is predisposed to expect a guilty verdict will tend to arrive more readily at the conclusion that the evidence presented amounts to proof beyond a reasonable doubt. Hovey, supra, at 1348.

3. A capital jury, which has been predisposed by virtue of the very process by which it has been selected to think the accused guilty in advance of trial, is unlikely to function properly or maintain its neutrality. As a jury's neutrality decreases, the quantum of evidence necessary to prove guilty also decreases.

Hovey, supra, at 1349.

C. In addition to making a capital jury prone to convict, the non-sequestered method of death qualification may alter the states of mind of the jurors exposed to it in ways which make them more likely to impose a death sentence. Death-qualification of jurors in the presence of other veniremen therefore inhibits the ability of the jury to perform their constitutionally mandated function to "express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 88 S.Ct. 1770 (1968), at p. 1775. "It is, of course, settled that a state may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' (Citations omited) It requires but a short step from that principle to hold, as we do today, that a state may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Witherspoon, supra, at p. 1776. The process of non-sequestered death-qualification is constitutionally impermissible because, as in Witherspoon, it produces a jury "uncommonly willing to condemn a man to die." Witherspoon, supra, at p. 1776.

1. During a death-qualifying voir dire, venirepersons are questioned in open court about their attitudes toward the death penalty. The fact that the court dismisses those venirepersons who express unequivocable opposition to the death penalty is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes. Jurors whose scruples against capital punishment are not so irrevocable as to disqualify them under Witherspoon feel that in the eyes of the law, their attitudes are improper, or at least suspect. Those jurors may in consequence feel less willing to express or rely on such attitudes in their consideration of penalty.

Hovey, supra, at 1350.

2. In a capital voir dire, prospective jurors are repeatedly prompted to think about the penalty decision they may later be called upon to make. What was

initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life. Some jurors initially face the penalty decision with reluctance and aversion. This may represent a significant viewpoint in the community. A process which systematically erodes these attitudes would make the jury less representative of the community and more inclined to impose death.

D. The most practical and effective procedure available to minimize the untoward effects of death-qualification is individualized sequestered voir dire. Because jurors would then witness only a single death-qualifying voir dire—their own—each individual juror would be exposed to considerably less discussion and questioning about the various aspects of the penalty phase before hearing any evidence of guilt. Such a reduction in the pretrial emphasis on penalty should minimize the tendency of a death-qualified jury to presume guilt and expect conviction.

Hovey, supra, at 1353.

E. To deny this motion is to deny the Defendant his right to a fair trial by an impartial jury comprised of a representative cross-section of the community, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, 16, and 22 of the Florida Constitution.

F. Should the Court feel that the allegations in this motion are false or of questionable validity, the Defendant moves for an evidentiary hearing in which the defense will prove the truth of each and every allegation in this motion.

1. Proof of these allegations will require the use of expert testimony presented by one or more experts in this area of study.

2. In order that the Defendant may present such expert testimony, the defense moves for the entry of an order approving the taxing of reasonable costs to the county for expert witness fees, housing, and transportation.

3. The Defendant is indigent and has no means to pay for expenses incurred in an evidentiary hearing.

4. The Public Defender's Office has no budgetary allotment for such expenses.

5. To deny the Defendant the expenses necessary to conduct an evidentiary hearing to prove the allegations of this motion is to deny the Defendant the effective assistance of counsel, due process of law, and equal protection under the law, in violation of Article I, Section 9 and 16 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution.

WHEREFORE, the Defendant prays this Honorable Court to grant this motion.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

BY: Robert Link
Robert Link
Assistant Public Defender

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Individual and Sequestered Voir Dire has been furnished to the Office of the State Attorney, by hand, this 9 day of June, A.D., 1982.

Robert Link

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 82-4752CF
DIVISION: A

FILED
AUG 11 1982
CLERK - CIRCUIT COURT

STATE OF FLORIDA

VS

ALLEN LEE DAVIS

- - - - - - - - - - -

MOTION FOR CHANGE OF VENUE

Comes now the Defendant, ALLEN LEE DAVIS, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and pursuant to Rule 3.240 of the Florida Rules of Criminal Procedure, moves this Court for an order removing this cause to another county within the State of Florida for trial. As grounds in support of this motion, the Defendant, being duly sworn, hereby deposes and sets forth:

1. The Defendant was indicted and charged with three counts of First Degree Murder.

2. The death of the Weilers and the arrest of Allen Lee Davis has been subjected to extensive media coverage via television, radio, and newspapers in the Duval County area.

3. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, that Allen Lee Davis was arrested after he failed a polygraph examination.

4. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, Allen Lee Davis's prior criminal record as well as the fact that the Defendant is currently on felony parole.

5. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, statements of Allen Lee Davis to representatives of the Jacksonville Sheriff's Office, placing him at the scene of the murders at the time the victims were alleged to have been killed.

6. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, certain aspects of the police investigation, to wit: fiber analysis and the searching of local waters for a weapon.

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7. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, certain evidence relating to a gun belonging to the Defendant's father being reported missing, which was consistent with the weapon or discription of the weapon involved in the death of the Weilers.

8. The State, through its agent, the Jacksonville Sheriff's Office, released copies of the Arrest and Booking Report to the news media at first appearance court wherein the information regarding the polygraph examination was contained.

9. The Defendant's arrest, as well as subsequent court appearances by the Defendant or his counsel, have been reported by the local news media to the public in the Duval County area.

10. The knowledge of the case and of the Defendant as reported in the news media is widespread in Duval County. The potential for prejudice in the community as a result of such information or the exposure to such inadmissible evidnece or testimony is great.

WHEREBY, due to the State's misconduct and the extensive television, radio, and newspaper coverage, the Defendant, believing that he cannot receive a fair trial or select an impartial jury in Duval County, Florida, because of the members of the community could not put these matters out of their minds and try the case solely on the evidence presented in the courtroom, respectfully requests that this Court grant this Motion for Change of Venue and order the removal of this cause to another convenient county where a fair and impartial trial can be had.

Allen Lee Davis

ALLEN LEE DAVIS

STATE OF FLORIDA

COUNTY OF DUVAL

Before me, the undersigned authority, personally appeared ALLEN LEE DAVIS, who being by me duly sworn, says the statements contained in the foregoing Motion for Change of Venue are true and correct according to the best of his knowledge and belief.

- - - - - - - - - - - - - - -

Sworn to and subscribed before me
this 11 day of August, A,D., 1982.

George A. Sloan
Notary Public, State of Florida
At Large

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Apr. 5, 1985
Bonded by Transamerica Insurance Co.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

BY: Anthony B. Zeboomi
Anthony B. Zeboomi
Assistant Public Defender

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Motion for Change of Venue is made in good faith and not imposed merely for the purpose of unnecessary delay.

Anthony B Zeboomi

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Change of Venue has been furnished to the Office of the State Attorney, by hand, this 11th day of August, A.D., 1982.

Anthony B Zeboomi

IN THE SUPREME COURT OF FLORIDA

ALLEN LEE DAVIS,

Appellant,

v. CASE NO. 63,374

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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| ALLEN LEE DAVIS, | : | |
| Appellant, | : | |
| v. | : | CASE NO. 63,374 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| | : | |

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, ALLEN LEE DAVIS, was the defendant in the trial court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution, and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". The transcripts of the pre-trial, jury selection, trial, penalty, and sentencing proceedings will be referred to by use of the symbol "T". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE AND FACTS

Allen Davis was charged by indictment returned May 27, 1982, with three counts of first degree murder, in the deaths of Nancy, Kristina, and Katherine Weiler (R-55-57). The Public Defender was appointed to represent him (R-3).

On August 11, 1982, the defense filed a motion for change of venue, asking that the trial be moved from Duval County (R-205-223). After a hearing on August 17, 1982, the trial court, over defense objection, deferred ruling on the motion until an attempt had been made to select a jury in Duval County (T-271-72).

On September 17, 1982, the defense moved to suppress certain statements and admissions allegedly made by appellant to police officers (R-237-38). After a hearing on November 8-9, 1982, the trial court denied the motion to suppress these statements (R-259,268).

On September 21, 1982, the Public Defender's Office filed a certification of conflict and motion to withdraw from representation of appellant (R-239). The trial court granted the motion to withdraw on October 5, 1982, and appointed Frank Tassone, Jr. to represent appellant (R-244, T-307). Three days later, the Public Defender's Office asked to be re-appointed, as the claimed conflict had turned out not to exist (R-245-46). The trial court declined to re-appoint the Public Defender's Office (R-247). On January 7, 1983, Mr. Tassone filed a Notice of Adoption of Previously Filed Motions, in which he adopted, inter alia, the motions for change of venue and for individual and sequestered voir dire which had previously been filed by the Public Defender's Office (R-269).

Immediately prior to jury selection on January 31, 1983, the trial court denied the defense's motion for individual and sequestered voir dire (R-287, T-532). A jury was empaneled, and the case proceeded to trial before Circuit Judge Major B. Harding on February 1-4, 1983.

The state presented thirty-four witnesses, including John Weiler, husband and father of the victims, who testified that a Nikon 35 millimeter camera was missing from his home (T-840-41); Dr. Bonafacio Floro, the

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* Due to the anticipated length of this brief, and since appellant is not challenging the sufficiency of the evidence on appeal, the following summary is not intended to be a complete statement of the evidence. The facts of the case, as they relate to the particular issues raised, will be set forth in the appropriate section of argument.

assistant medical examiner, who determined that Nancy Weiler died as a result of multiple blunt impacts to the head (T-975); Kristy Weiler had been shot in the head and chest (T-997); and Kathy Weiler had been shot in the lower back, and had also received several lacerations of the head (T-1010-12); police officers Charles Kessinger, Derry Dedmon, Ray Smith, and Leroy Starling who testified with respect to statements allegedly made by appellant, in which he admitted being in the Weilers' house, that he did not remember everything that happened there, and that he "could have" taken his father's gun with him [See Issue IV, infra]; police officers, including Kessinger and others, who testified with regard to items of physical evidence seized from appellant, including a rope taken from the back of his truck (T-1067-68) and articles of clothing taken from his apartment (T-1169); Donald Davis, appellant's father and the next-door neighbor of the Weilers, who testified that he told Detective Kessinger that his .357 Ruger Black Hawk pistol, which he had placed on top of his refrigerator a week or two before the murders, was missing (T-1262-70); Gloria Lee, Angelo Giovagnoli, and Ginny Baumgartner, neighbors of the Weilers who testified that they saw appellant walking in the neighborhood around the time of the murders; Paul Doleman, a forensic serologist, who testified that blood found on one of appellant's boots and on one of his shirts was not consistent with appellant's blood but was consistent with Nancy Weiler's blood (T-1429-31); David Warniment, an FDLE firearms examiner, who examined the metal fragments of five semi-jacketed bullets which had been found in the Weiler home, and determined that they were most consistent with having been fired from a .357 magnum Ruger Black Hawk, single-action revolver (T-1483-84); Warniment also examined several other metal fragments found at the scene of the murders and determined that

these fragments were consistent with once having been part of a Ruger Black Hawk single action revolver (T-1503); Richard Padon, a friend of appellant's, who testified that he drove appellant to his father's house for the purpose of committing a burglary in the neighborhood, and that when he later picked appellant up, he had three paper bags with him, one of which contained a 35-millimeter Nikon camera (T-1520-21, 1529-31); Mary Lynn Henson, a microanalyst with the FDLE, who stated her opinion that the piece of rope with which Kristy Weiler's wrists were bound was at one time attached to a piece of rope seized from appellant's truck (T-1582); and Donald Havekost, a neutron activation analyst with the FBI, who stated his opinion that the bullet fragments found in the Weiler home came from the same source of lead as the eighteen live cartridges contained in Donald Davis' ammunition box (T-1603).

The jury returned verdicts finding appellant guilty as charged on all three counts of first degree murder (R-301-03, T-1770).

The penalty phase of the trial was conducted on February 9, 1983. The jury recommended imposition of the death penalty on all three counts (R-308-10, T-1849-51).

On March 2, 1983, the trial court adjudicated appellant guilty on each of the three counts (R-316), and imposed three sentences of death (R-318-20). The court found, as aggravating circumstances, (1) that the crimes were committed while under sentence of imprisonment (referring to the fact that appellant was on parole), (2) that appellant was previously convicted of prior violent felonies, (3) that the crimes were committed during the course of a burglary, (4) (as to the murder of Kathy Weiler only) that the crime was committed for the purpose of avoiding arrest, (5) that the crimes were especially heinous, atrocious, or cruel, and (6) that the crimes were committed in a cold, calculated, and premeditated manner (R-324-28). The trial court found no mitigating factors (R-323-24).

Notice of appeal was filed on March 3, 1983 (T-331).

## III ARGUMENT

### ISSUE I

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT APPELLANT'S MOTION FOR CHANGE OF VENUE

A. The Nature of the Pre-Trial Publicity

Allen Davis was placed under arrest for the Weiler murders in the early morning of May 13, 1982 (R-1-2, T-1078). The probable cause statement in the arrest report includes the following remarks:

> Allen Lee Davis admitts (sic) being at the victims home at approx. time of their death, 8 P.M. 11 May 1982. Allen Lee Davis failed a polygraph examination conducted by the Jax. Sheriff's Office.[1]
>
> (R-2).

On August 11, 1982, the defense filed a motion for change of venue, which contained the following allegations:

> 1. The Defendant was indicted and charged with three counts of First Degree Murder.
> 2. The death of the Weilers and the arrest of Allen Lee Davis has been subjected to extensive media coverage via television, radio, and newspapers in the Duval County area.
> 3. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County

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[1] While it is true that Davis admitted being in the Weiler home at around 8:00 P.M., and that he did not recall everything that happened there, he did not admit to committing the murders or being aware of them (see T-1061-62,1200,1214). Therefore, it appears that Detective Kessinger juxtaposed Davis' admission of being in the house at 8:00 with someone else's (presumably the medical examiner's) conclusion about the time of death. [Dr. Floro testified at trial that the time of death was between 6 P.M. and midnight (R-964)]. Accordingly, the statement in the arrest report subtly implies that Davis admitted to an awareness of the time of death, and thus to an awareness of the murders. This potentially misleading implication was compounded a hundred-fold in a television newscast which stated, inter alia, that "[Davis] was in the presence of the victims at the time of their death and he admits to this and he has also failed the polygraph test" (T-145).

area, that Allen Lee Davis was arrested after he failed a polygraph examination.

4. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, Allen Lee Davis's prior criminal record as well as the fact that the Defendant is currently on felony parole.

5. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, statements of Allen Lee Davis to representatives of the Jacksonville Sheriff's Office, placing him at the scene of the murders at the time the victims were alleged to have been killed.

6. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, certain aspects of the police investigation, to wit: fiber analysis and the searching of local waters for a weapon.

7. The State, through its agent, the Jacksonville Sheriff's Office, improperly released to the news media, which was disseminated in the Duval County area, certain evidence relating to a gun belonging to the Defendant's father being reported missing, which was consistent with the weapon or discription of the weapon involved in the death of the Weilers.

8. The State, through its agent, the Jacksonville Sheriff's Office, released copies of the Arrest and and Booking Report to the news media at first appearance court wherein the information regarding the polygraph examination was contained.

9. The Defendant's arrest, as well as subsequent court appearances by the Defendant or his counsel, have been reported by the local news media to the public in the Duval County area.

10. The knowledge of the case and of the Defendant as reported in the news media is widespread in Duval County. The potential for prejudice in the community as a result of such information or the exposure to such inadmissible evidence or testimony is great.

(R-205-06).

Appended to the motion was an affadavit of Assistant Public Defender Anthony Zebouni, stating that he personally observed Sheriff's Office employees tendering copies of the arrest report, which contained references to Davis' having failed a polygraph and to his statements placing him in the Weiler home, to television and radio personnel at Davis' bond hearing (R-208). Also included were affadavits of fifteen Duval County attorneys, who stated their opinions that Allen Davis could not obtain a fair and impartial jury in the county as a result of extensive newspaper publicity and T.V. and radio coverage of the case, and specifically the exposure of members of the community to the inadmissible evidence of Davis' having failed a polygraph examination (R-209,210,211,212,213,214,215,217,218,220,223), and his prior record of violent crime (R-213,217,218,219,223), and to the dissemination of statements concerning Davis' presence at the crime scene at the time of the offense (R-222).

At the hearing on the motion, the defense introduced an audit report showing the daily circulation of the Jacksonville newspapers. These figures were: Times-Union-115,666; Journal-43,600; Saturday-132,279; Sunday 146,423 (T-128-29). Certain newspaper articles were introduced into evidence as Defendant's Exhibit 4 (T-130).[1.5]

The Jacksonville Journal of May 13, 1982 contained an article headlined "Suspect charged in triple murder", which included a photograph of police and funeral home employees removing the bodies of Mrs. Weiler and her daughters from their home (R-50). The article stated, inter alia:

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1.5 The exhibits introduced at the change of venue hearing will be transmitted to this Court. Two of the newspaper articles contained in exhibit 4 can also be found at pages 50-51, 53-54 of the record.

> Police said records indicate Davis, a ( p-
> yard welder, was arrested in 1965 at Bangor, Maine, for assault and in 1966 in Baltimore, Md., for involuntary manslaughter with a vehicle.
>
> Duval County Circuit Court records show he was sentenced to a total of 15 years here in 1973 after being convicted of two robberies and an attempted robbery. It could not be determined today if Davis served any time in prison on those convictions.
>
> (R-50, see T-130).
>
> The suspect agreed to take a lie detector test and failed it, officers said. They declined to reveal the test questions.
>
> Homicide Detective Charles Kesinger said Davis told him he had seen Mrs. Weiler early Tuesday evening, the time members of the Duval County Medical Examiner's Office believe the killings occurred.
>
> (R-51, see T-130-31).

The Journal of May 13, 1982 also contained an article headlined "Explaining girl's slaying a tough job for teacher." The article dealt with the trauma faced by Kristy Weiler's fifth grade teacher, in breaking the news of Kristy's murder to her classmates. It read, in part:

> Kristina, who was called "Kristy", was a bouncy, "cheerleader type" who enjoyed doing handicrafts with her mother, Ms. Robichaud said. She had been selected by her classmates as the March "Supercitizen," said school Principal Marilyn Duncan.
>
> Yesterday would have been Kristy's 10th birthday. She had planned a birthday party at her home after school, and her class was taking a field trip to the zoo.
>
> "They were having a disco party for her birthday. The invitations were so cute, she wrote them herself and said, 'Be sure to wear your disco clothes.' Eddie (a classmate) was so upset because he forgot his dancing shoes," Ms. Robichaud said.
>
> (Defendant's Exhibit 4, p. 4).

* * * * * *

"We did not tell that Kristy was the one that died," Mrs. Duncan said, adding that the children were told the birthday party had been canceled because of a death in the family "so these children wouldn't go over and run right into the tragedy and all that would be connected with it."

Ms. Robichaud said Kristy's classmates did not seem satisfied with the explanation.

"They wanted to know who had died and I said, 'I don't know.' They wanted to know if the party would be held.

"They said, "Why is your nose so red? Why have you been crying? They know something is wrong, and I hope the parents are understanding about it. I feel sorry for those parents," Ms. Robichaud said.

But she knows she will have to do some explaining to her class today.

"I'm going to be very honest with them. They're going to be very scared, horribly scared. They're going to want comforting and they're going to want to know why it happened.

"I'm going to try to make it a normal day... with a lot of silent meditation."

(Defendant's Exhibit 4, p. 5).

The Times-Union of May 13, 1982 reported the reaction of Dr. Bonafacio Floro, the assistant medical examiner:

When Floro left the house yesterday afternoon, he wiped tears from his eyes and brushed aside reporters' questions until he had made a preliminary examination.

He was visibly shaken.

"It was because there were kids involved and the way they were killed," Floro, himself the father of three children, a girl, 12, and two boys, 4 and 7, said later.

"You get emotional for anybody who had kids that died. They're so innocent; they did not know what was going on," he said.

(Defendant's Exhibit 4, p. 6).

The Times-Union of May 14, 1982 contained an article headlined "Welder held in slayings of mother, 2 daughters," featuring a large photograph of Allen Davis in handcuffs (R-53, see T-131). The story begins "A 37-year old welder who was paroled from prison in 1979 ..." (R-53). Davis is described as a 6-foot 340-pound individual nicknamed "Tiny" (R-53). The article continues:

> Circuit Court records showed that Davis pleaded guilty in 1973 to armed robbery, attempted armed robbery and carrying a concealed firearm, and that Circuit Judge R. Hudson Oliff sentenced him to 15 years in prison.
>
> Davis was paroled Sept. 25, 1979, after serving most of the six years at Doctors Inlet Road Prison in Clay County, said David Skipper, a spokesman for the state Department of Corrections in Tallahassee.
>
> He was paroled because he had a clean disciplinary record, good progress reports and showed a favorable prison adjustment, Skipper said.
>
> Court officials said Davis also was convicted in 1966 in Baltimore of involuntary vehicular manslaughter for which he was sentenced to three years.
>
> And in 1961, Davis was convicted in Bangor, Maine, of assault and battery and was sentenced to six months to three years.
>
> (R-53-54, see T-131-32)
>
> . . . . . .
>
> Davis came under suspicion about eight hours after the bodies were found at 11 a.m. Wednesday, police said.
>
> He was questioned by homicide detectives Wednesday night and voluntarily submitted to a lie-detector test, said homicide Lt. Jim Suber. He was arrested and booked about 2 a.m. yesterday.

Davis' pickup truck, which was found near the Weilers' house, was examined for physical evidence.

"We got this thing under heavy investigation," Suber said yesterday. "We're trying right now to tie some loose ends. We haven't found the gun, and we can't comment on the evidence we have."

(R-54, see T-132).

On May 18, 1982, the Jacksonville Journal published an article headlined "Alligator impedes probe." This article concerned police efforts to recover the murder weapon, a pistol. Divers were searching several bodies of water, and there were apparently alligators in the locations being searched. Homicide detectives said they didn't know anything about alligators:

"I'm not verifying the information," Lt. Jim Suber said. "We're searching four or five bodies of water. This is just one more place."

Suber said any comments could hinder the investigation and that if anything were printed, a guard would be placed in the area being searched to prevent anyone from tampering with evidence that might be found there.

"Whoever knows where that gun is, knows where the water is" he said.

"You can never know for sure what people will do."

Suber said his fears were not that another suspect might be at large, but that relatives or friends of Allen Lee Davis, the 37-year old shipyard welder charged with the triple slayings could try to prevent investigators from discovering evidence.

(Defense Exhibit 4, p. 12, see T-133).

The defense called as a witness Steven Crosby, assistant news director at WJXT Television, Channel 4, who presented "dubs" (video taped segments which appeared on the air) from newscasts concerning

the Weiler murders (T-138-42). One of these newscasts announced:

> Thirty-seven-year-old Allen Lee Davis booked into the Duval County Jail early this morning; he's charged with triple murders of Nancy Weiler and her two children, ten-year-old Christina and five-year-old Kathy.
>
> Early in the investigation, attention focused on this man, Allen Lee Davis, the son of the Weiler's next-door neighbor. After questioning Davis, police found substantial evidence in both the suspect's truck and, upon investigation of the house, linking him to the crime.
>
> He was in the presence of the victims at the time of their death and he admits to this and he has also failed the polygraph test.
>
> According to the police, Davis agreed to be interviewed at the Jacksonville Sheriff's Office. This is not his first brush with the law. Police say he was out on parole and has a lengthy criminal record. He is scheduled to be arraigned later this morning.
>
> Jeff Silverstein, Channel 4, Eyewitness news.
>
> (T-145).

Other channel 4 broadcasts carried the following information and commentary:

> The neighborhood in this community is a very close-knit group. The only word is horrible. That is the only word. Things like this don't happen in a nice neighborhood and this is a nice neighborhood and they were nice people.
>
> Twelve-year-old blank blank was invited to the birthday party planned for Cristina. She would have been ten years old. I got off of the bus and I didn't want to believe it at first. It's kind of senseless but I found out it was a crime.
>
> (T-145).
>
> . . . . . .
>
> The crime was called untimely. He is the son of the of the Weilers' next-door neighbor. Police say they found cord similar to that used to bind the wrists of the Weiler child in the Chevrolet pickup. They say his handgun is missing and has not yet been found.

Davis today has been charged with murder at 3:00 o'clock this morning, after he flunked a lie detector test. Davis had already been convicted of assault and disorderly conduct. He was out on parole for armed robbery. Fellow shipyard workers and friends give a completely different picture of Davis. They say he is a good natured man who loves children, a good co-worker. They say they can't believe he is a man who could be guilty of committing three murders.

Bill Palmer worked with Davis two years says he's okay, he loved to sit down and talk about hunting, fishing and back in Maine, that's where he's from. I can't believe that this happened. I can't believe it's true. I am sick about this whole thing. Since leaving the North Florida Shipyard in the fall, friends say Davis worked in other shipyards. They say he was laid off a few weeks ago. Davis shared his Arlington apartment with Mary Collins. It's unbelievable. I can't believe it. I really can't. Especially when it comes to children, I can't believe he would do something like that. I really don't believe he did it.

John Weiler is staying with friends after flying back from Pittsburgh yesterday. He said he is trying to make funeral arrangements for his family so brutally taken away from him.

Wynn Farley, Channel 4 Eyewitness News.

(T-146-47).

. . . . . .

There might have been some doubt in people's minds, there was no doubt in our mind now that we have the right suspect. Lt. Suber would not comment on the circumstances but here's what we know of evidence from the individuals close to the investigation: During several hours of questioning in the interrogation room, the police said Davis told them he was in the Weiler home the night of the murders but also said he had a lapse of memory. The detective that made up the arrest report wrote Allen Davis stated he could not remember everything that happened while he was at the victims' home.

The Duval County Medical Examiner put the time of death somewhere between 7:30 and 9:00 o'clock. John Weiler told police he talked with his wife on the phone at a quarter of 7:00 while she was preparing dinner.

A neighbor said she called the Weiler home at 8:15

and there was no answer. Davis, himself, told the police he was in the house around 8:00 o'clock. Police first questioned Davis as a possible suspect witness when his father, the Weiler's next-door neighbor, reported his gun missing.

The police believe the gun to be the same kind that the suspect used. They think it was a .357 caliber revolver like this one as fragments of the wood from the murder weapon were found by the victims which were pistol whipped.

Sources close to the investigation say the pistol was a Black Hawk .357 Magnum. The insignia was all that was found at the scene that would make it the same type gun Davis' father reported missing. The whereabouts of the actual murder weapon remains a mystery.

Among evidence taken from the truck was nylon cord believed to be identical to one of the cords used to tie up one of the children. Detectives secured the scene at the time and Davis' apartment, looking for physical evidence. Their findings were brought here to the Jacksonville Crime Lab where they will look for fibers, hair and do ballistic tests.

I think we have a very significant case against him at this point and I hope to have even a better case at trial time based on physical evidence and witnesses. Davis' attorney said he will ask the Court to move the case out of Jacksonville. We predict it will be a very sensitive case.

Denny Silverstein, Channel 4 Eyewitness news.

(T-147-49).

The video tape next depicted Allen Davis, handcuffed, wearing a baseball cap, and flanked by two officers, apparently being transported to the Duval County Jail during the night time (T-147).

The Channel 4 stories concerning the Weiler murders were aired at noon, 6:00 p.m., and 11:00 p.m., and some may have appeared on more than one newscast (T-142,150). According to an Arbitron survey covering the period from April 28 - May 25, 1982, Channel 4 News had a potential

weekday viewing audience[2] of 55,000 households or 72,000 persons for the noon broadcast, 109,000 households or 174,000 persons for the 6:00 p.m. broadcast, and 56,000 households or 92,000 persons for the 11:00 p.m. broadcast (T-150-51). Crosby indicated that this survey would include Duval County, and the surrounding counties of Baker, Bradford, Clay, Columbia, Nassau, and Putnam.[3]

Gerry Howard, news director of WJKS-TV, Channel 17, presented four taped news broadcasts concerning the Weiler murders. He estimated that, altogether, these stories would have been aired a dozen or more times (T-157,163). The third newscast, which was aired on May 13, 1982 at 6:00 p.m., again at 11:00 p.m., and on Newswatch 17 update the following morning (T-161, see T-157), related the following information:

> Davis was charged with the murders early this morning after four hours of interrogation. Police said he voluntarily submitted to a lie detector test and failed. Other evidence includes rope found in the back of pickup which may have been used to tie the hands of Kathy Weiler who was found shot to death. Police say Davis who was denied bond admitted being in the house around 8:00 p.m. Wednesday night.
>
> Davis had been convicted twice and released from Raiford in 1969.[4]
>
> (T-162).

. . . . . .

---

2 Crosby defined his "potential viewing audience" as the number of households which, there would be good reason to believe, would have television sets tuned to Channel 4 WJXT at a particular time (T-151).

3 The population of Duval County, according to the 1980 census, was 570,981. The combined population of the six other counties was 221,206. According to voter registration statistics submitted by the defense, there were 251,304 registered voters (and therefore 251,304 potential jurors) in Duval County as of August 4, 1982 (T-126).

4 This date is incorrect. Davis was paroled from the Florida prison system in 1979. (See R-325, T-1785). The child whose hands were bound was Kristy Weiler.

> Richard Padden[5] said he had spoken to Davis around 6:00 p.m. Tuesday night just about two hours before the murders were committed. He shook my hand and told me any time I needed anything, give him a holler. Did he indicate to you why he was in such a good mood? No. Looked like to me he had been out working. Police are searching the waters in back of the Weiler home in hopes of finding the murder weapon.
>
> (T-162-63).

Howard indicated that approximately 20,000 people see the 6:00 p.m. newscast on Channel 17, and approximately 19,000 people see the 11:00 p.m. newscast (T-159-61). Channel 17's signal encompasses a five-county area, including Duval, Clay, St. John's, Baker, and Flagler[6] (T-155).

Irene Shubert, administrative assistant to the news desk at WTLV-TV Channel 12, presented several video taped news segments on the Weiler murders. The first story was aired at noon on May 12, 1982, and included the following comment (which was repeated during the 6:00 p.m. broadcast):

> The neighbors were in total shock, completely wiped out. We never had anything happen before like this. I have been in the Military but not next door -- the murders came on the morning eve of the celebration that was the birthday of nine-year-old Christy Weiler.
>
> (T-169).

On "Good Morning, Jacksonville" on May 13, an information officer

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[5] Richard Padon testified at trial that he drove Davis to Davis' father's house to commit a burglary in the neighborhood; that he later picked Davis up; and that Davis had three brown paper bags, one of which contained a Nikon camera (T-1518-35). Padon did not mention any of this to police until September, because he did not want to get involved (T-1535).

[6] The combined 1980 population of the four surrounding counties is 144,557, compared to Duval's 570,981.

from the Sheriff's Department was shown making the statement:

> Time of death, according to Medical Examiner, was approximately 8:00 p.m. At that particular time, he was in the company of victims.
>
> (T-170).

Another Channel 12 newscast, apparently aired on June 9, 1982 (see T-173), conveyed the following information to viewers:

> ... there were not just three deaths on May 11. Mrs. Weiler was pregnant at the time. The pregnancy is early and it is unlikely another murder charge will result.
>
> The police now have three witnesses that can pin down Davis' whereabouts on the day of the murders. One neighbor apparently spotted Davis near where the murders occurred with a gun in his hand. Neither the police nor the Public Defender or prosecutor would have any comment or action.
>
> Assistant State Attorney Ralph Greene would not comment on Davis' case but he would talk about the use of hypnosis testimony in court. We're not talking about hocus pocus, you know, of a carnival show; it's well recognized, well thought of technique to help a person remember.
>
> But the case against the unemployed shipyard worker is growing more complicated, one that the defense feels would have to be decided outside of Duval County.
>
> (T-172).

In July, 1982, Channel 12 broadcast an editorial piece by Allen Rothstein:

> The murder occurred while Davis was out on parole. Allen Lee Davis is accused of killing a Jacksonville mother and her two children while out on parole for armed robbery this year. I think that he needed to serve a little more time than three years. I mean, that was a child that he first killed. He was in court today trying to stop the prosecution from using an alleged conviction but he has not yet been tried for the second trial -- (inaudible) parole and probation

people are letting people out on the streets too early, that he's got a criminal out there on the street.

Mistakes are made but -- we cannot predict what a person will or will not do. We try to make the best judgment we can based on the information that we have (inaudible). Why should I agonize over a sentence if they're going to take them over there in due time and re-sentence them, why don't we try them and say you all do what you want to with them?

Channel 12, Allen Rothstein.

(T-173).

According to an Arbitron survey, there are 169,000 households in the WTLV viewing area. The estimated viewing audiences for the news broadcasts are: Good Morning, Jacksonville - 10,000 households; noon - 15,000; 6:00 p.m. - 40,000; and 11:00 p.m. - 33,000 (T-174). Stories are sometimes broadcast on more than one news program (T-167). The station's major market is Duval County; its signal reaches into south Georgia and Clay, Nassau, and Baker Counties.[7]

Arguing in support of the motion for change of venue, defense counsel asserted that the extensive pre-trial publicity in this case was irreparably prejudicial in that it exposed the Duval County community to 1) inadmissible evidence of Davis' prior criminal record, including convictions of manslaughter, two armed robberies, and attempted robbery (T-183,186,187); 2) inadmissible evidence that Davis was on parole at the time of the murders (T-184,185,186); 3) inadmissible evidence that Davis took a polygraph and failed it (T-183,184,185,186,187); 4) Davis' statements (the admissibility of which had yet to be determined) to police, placing him in the Weiler home at the time the medical examiner believed the murders occurred, and claiming that he had a lapse of memory while in the house (T-184,185,186,187); 5) ex parte statements of

[7] The combined 1980 population of the latter three counties is 115,235.

evidence indicative of guilt which the police had assembled, including the facts that a handgun belonging to Davis' father was missing (T-186), that a cord found in Davis' truck matched the cord which bound Kristy Weiler's wrists (T-186,187), and that police had found three eyewitnesses who could pin down Davis' whereabouts, one of whom saw him in the neighborhood with a gun in his hand (T-187); 6) statements by state officials expressing their certainty of Davis' guilt; that they had the right suspect, and that they had a "very significant case" against him (T-186); 7) statements by police to the effect that Davis' friends or relatives might interfere with their efforts to find evidence; specifically the missing handgun (T-185); 8) inflammatory commentary strongly tending to evoke community sympathy for, and identification with, the victims (and, concomitantly, prejudice against the named suspect, Davis), including an article about Kristy's schoolteacher having to break the news of her death to her classmates (T-184), newscasts emphasizing the reaction of the Weilers' close-knit, upper-middle class, family-oriented neighborhood to the horror and senselessness of the crime (T-186,187); references to Mrs. Weiler's being pregnant at the time of her death (T-187); references to Kristy's tenth birthday party which was to have been held the next day (T-184, 186), and the medical examiner's emotional reaction as he left the house (T-184); and 9) a telecast denouncing parole authorities for releasing prisoners back onto the streets to commit crimes, and referring specifically to Allen Davis as one who "needed to serve a little more time" and who subsequently murdered a child (T-187-88).

Defense counsel argued that, as a result of these highly prejudicial disclosures by the media, and by the police through the media, "the damage has already been done, [and] that in order to insure that a

fair trial is had, the Court has to change the venue" (T-223). The trial court instead chose to defer ruling on a change of venue until an attempt to select a jury in Duval County had been made (T-271). The defense objected, and reiterated its position that the case should be moved to another jurisdiction at this time (T-272).

Jury selection commenced on January 31, 1983. The trial court granted each side three additional peremptory challenges, and denied the defense's motion for individual and sequestered voir dire (T-532) [See Issue II, infra]. During voir dire, at least nine prospective jurors indicated that they had some prior knowledge of the case,[8] from television, radio, newspapers, or word of mouth. Early in the voir-dire, a prospective juror (unidentified in the record) said "I must honestly say I read the paper rather thoroughly..." and indicated that he was not sure at that point if he could be open-minded or not (T-651). A second unidentified prospective juror said the same applied to her (T-561). Prospective juror Lane said she knew about the case from watching televison, knew in her heart how she felt about it, and had already more or less made up her mind (T-644-46) [See Issue III]. Prospective juror Richardson (who served on the jury) knew something about the case from the newspaper and TV (T-651). Prospective juror Price, who had heard something about the case (T-763), when asked by the prosecutor whether she could vote for the death penalty, stated:

> Well, the way it was expressed to me, sir,

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[8] These potential jurors included Richardson (T-599-600, 651), Lane (644-46), Stanley Johnson (T-599, 646-47), Jackson (T-601-02, 650-51), Cassidy (T-564,625, 636-37), Griswold (T-609), James Johnson (T-677, 688-89), Robb (T-770), and Price (T-763, see T-741).

these people get out on probation and they done these horrible things, that's the only question that I would say about capital punishment.

(T-741).

Three of the prosepective jurors who had some prior knowledge of the case, Richardson, Jackson, and Griswold, ultimately served on the jury (T-774, 1770-71, 1851-53).

B. The Nature and Content of the Pre-Trial Publicity in this Case was so Irreparably Prejudicial to Appellant's Fundamental Right to an Impartial Jury, that Due Process Required a Change of Venue, with No Requirement that Actual Prejudice be Demonstrated on Voir Dire

A defendant in a criminal case is entitled to a fair trial by an impartial jury which will render its verdict based on the evidence and arguments presented in court without being influenced by outside sources. Irvin v. Dowd, 366 U.S. 717, 722 (1961); Taylor v. Kentucky, 436 U.S. 478,485 (1978); United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978); United States v. Hawkins, 658 F.2d 279, 282 (5th Cir. 1981). While it is true that a motion for a change of venue is addressed to the sound discretion of the trial court [see e.g. Manning v. State, 378 So.2d 274, 276 (Fla. 1979)], it is also true that when a community is "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result," the court is obligated to grant the motion. Manning v. State, supra, at 276. Under certain unusual circumstances, where the inherently prejudicial character of the publicity to which the community has been exposed is extreme, the voir dire examination of prospective jurors may be incapable of curing the impact of the publicity, and due process may require a change of venue without regard to voir dire. See Rideau v. Louisiana, 373 U.S. 723, 727

(1963); Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); Oliver v. State, 250 So.2d 888, 890 (Fla. 1971); State v. Stiltner, 491 P.2d 1043, 1047-48 (Wash. 1971); Henley v. State, 576 S.W.2d 66, 71-72 (Tex. 1978); People v. Boudin, 457 N.Y.S.2d 302, 304-05 (1982).[9]

Among the categories of pre-trial disclosure of information and pre-trial commentary which (either alone or in combination) have been recognized as potentially prejudicial to an accused's right to a fair trial include:

1) Pre-trial publication of the defendant's criminal record, particularly if it reveals a significant history of violent crime. See e.g. Commonwealth v. Pierce, 303 A.2d 209, 211, 213 (Pa. 1973) (defendant's record dated to 1963 and included arrests for car theft, assault and battery, and carrying a concealed weapon; served time in state juvenile center); Commonwealth v. Frazier, 369 A.2d 1224, 1226, 1228-30 (Pa. 1977) (defendant previously convicted on morals charge; served time in prison); In re Miller, 109 Cal. Rptr. 648, 652-53 (Cal.App. 1973) (defendant had long criminal record including armed robberies and kidnapping a policeman, and spent 26 years in prison).

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[9] Other cases which discuss the circumstances under which a change of venue is constitutionally required, as a result of community exposure to inherently prejudicial publicity, even in the absence of an affirmative showing of actual prejudice on the part of prospective jurors, include Pamplin v. Mason, 364 F.2d 1, 5-7 (5th Cir. 1966); United States v. Williams, 523 F.2d 1203, 1208-09 and n. 10 (5th Cir. 1975); United States v. Chagra, 669 F.2d 241, 249-50 (5th Cir. 1982); Maine v. Superior Court of Mendocino County, 438 P.2d 372, 375-78 (Cal. 1968); Corona v. Superior Court for County of Sutter, 101 Cal.Rptr. 411, 414-18, (Cal.App.1972), Commonwealth v. Pierce, 303 A.2d 209, 212-15 (Pa. 1973); Commonwealth v. Frazier, 369 A.2d 1224, 1227-30 (Pa. 1977); Commonwealth v. Casper, 392 A.2d 287, 291-93 (Pa. 1978); Pollard v. District Court of Woodbury County, 200 N.W.2d 519, 520 (Iowa 1972); State v. Cuevas, 288 N.W.2d 525, 527 (Iowa 1980).

2) Pre-trial disclosure of the information that the defendant had recently been released or paroled from prison. See Commonwealth v. Frazier, supra, at 1226 (defendant released from state penitentiary just two months prior to the homicide).

3) Pre-trial disclosure of the information that the defendant has failed, taken, or refused to take a polygraph examination. See State v. Stiltner, 491 P.2d 1043 (Wash. 1971) (defendant was one of five suspects in embezzlement case; local newspaper ran several articles stating that the four other suspects had taken polygraph examinations and passed); contrast United States v. Kampiles, 609 F.2d 1233, 1239 (7th Cir. 1979) (publicity was not so prejudicial as to require change of venue; "[n]either the articles nor the telecast made any mention of Kampiles' confession, his failure of the polygraph examination or any other evidence that might have irreparably prejudiced the defendant"). See also Gannett Co. v. DePasquale, 443 U.S. 368, 369 (1979) (noting prejudicial effect of potential jurors becoming aware of inculpatory information which is wholly inadmissible at trial)

4) Pre-trial disclosure of any confessions, admissions, or inculpatory statements made by the defendant. See Oliver v. State, 250 So.2d 886, 890 (Fla. 1971)(when confession is featured in news media, change of venue should be granted upon request; voir dire process cannot cure the impact of such publicity); Singer v. State, 109 So.2d 7, 11 (Fla. 1959); cf. Hoy v. State, 353 So.2d 826, 830 (Fla. 1977) (distinguishing Oliver, and holding that change of venue was not required where report based on three contradictory statements by defendant was published in one particular newspaper, as was defendant's retraction of his confession, and voir dire affirmatively demonstrated that none of the individuals who served on the jury read that newspaper or had knowledge of the publications). See also Maine v. Superior Court of Mendocino County, 438 P.2d 372, 379 (Cal. 1968); Commonwealth v. Pierce, supra, at 211-

215; Commonwealth v. Frazier, supra, at 1226, 1228-30.

5) Publication of ex parte statements by police and other law enforcement officials announcing the evidence they have assembled against the defendant, and "describing facts, statements and circumstances which tend to create a belief in his guilt." Corona v. Superior Court for County of Sutter, supra, at 414-15;[10] Martinez v. Superior Court of Placer County, 629 P.2d 502, 505 (Cal. 1981). See Manning v. State, supra, at 275 (sheriff's department and state attorney's office released to the press their version of the facts and circumstances of the case, discussed the evidence which had been gathered, and released the names and the substance of the initial testimony of the primary witnesses); Singer v. State, supra, at 14-17 (constitutional guarantee of trial by impartial jury requires that publication of details of crime, especially as they tend to connect a named person with guilt or to establish the

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[10] In Corona, at 415, the appellate court observed:

> Indispensable to any morally acceptable system of criminal justice is a verdict based upon evidence and argument received in open court, not from outside sources. When community attention is focused upon the suspect of a spectacular crime, the news media's dissemination of incriminatory circumstances sharply threatens the integrity of the coming trial. The prosecution may never offer the "evidence" served up by the media. It may be inaccurate. Its inculpatory impact may diminish as new facts develop. It may be inadmissible at the trial as a matter of law. It may be hearsay. Its potentiality for prejudice may outweigh its tendency to prove guilt. It may have come to light as the product of an unconstitutional search and seizure. If it is ultimately admitted at the trial, the possibility of prejudice still exists, for it had entered the minds of potential jurors without the accompaniment of cross-examination or rebuttal.
>
> The goal of a fair trial in the locality of the crime is practicably unattainable when the jury panel has been bathed in streams of circumstancial incrimination flowing from the news media.

innocence of a named person, cannot be made).

6) Publication of statements by police and other law enforcement officials expressing their certainty of the defendant's guilt. See e.g. Corona v. Superior Court for County of Sutter, supra, at 416 (sheriff quoted in news media as stating "We're certain he committed the murders"); Martinez v. Superior Court of Placer County, supra, at 505-06 (release of statements by "presumably knowledgeable officials" indicating their belief in defendant's guilt); State v. Wilson, 202 S.E.2d 828, 831 (W.Va. 1974) (prosecutor made statements at press conference following defendant's arrest strongly indicating that defendant, among others, was guilty, and that main drug suppliers in county had been captured); State v. Thompson, 123 N.W.2d 378, 381 (Minn. 1963) (the vice is not in printing factual news, but in publishing "what purports to be the opinions of people who are supposed to know the facts"; among other improper statements was a remark by an unnamed police official that "[w]e could have arrested this man weeks ago but we don't want to arrest him until our case is so overwhelmingly concrete it leaves no possible chance for acquittal in a courtroom").

7) Publication of statements by police and other law enforcement officials speculating that the defendant, or his family, friends, or associates, will attempt to tamper with evidence or otherwise thwart justice. Cf. Commonwealth v. Pierce, supra, at 214 (report that district attorney's office refused to produce witnesses at arraignment because of alleged telephoned death threats); People v. Boudin, 457 N.Y.S.2d 302, 306 (1982) (news report that document seized from accused gang member "may hold clues to planned attempt to break other suspects in the case out of [jail]").

8) Pre-trial publication or broadcast of editorials, commentary,

or "human-interest" features of a nature which would arouse community sympathy for, or identification with, the victims of the crime, especially where the crime itself is particularly brutal or shocking and would naturally tend to evoke emotional reactions even absent the publicity. See e.g. Maine v. Superior Court of Mendocino County, supra, at 378-79 (victims, a popular teen-age couple from respected families, were assaulted "under circumstances that would compel any community's shock and indignation"; newspaper urged local citizens to contribute to fund to help girl's parents defray medical expenses); In re Miller, supra, at 652 (murder victim was popular policeman; donations for scholarship in his name were channelled through sheriff's office and flags were flown at half mast until funeral; newspaper published poignant account of mourners' emotions at funeral); Martinez v. Superior Court of Placer County, supra, at 505-06 (victim's status in community counts as factor in assessing risk of prejudice from a trial in the community; victim in Martinez was described in newspaper articles as a brakesman for community's largest employer, "and that factor undoubtedly engendered community sympathy").

9) Pre-trial publication or broadcast of inflammatory editorials or commentary tending to incite community outrage against "crime in the streets", "soft penalties for convicted criminals who are turned loose to prey on the public", and the like, particularly where the defendant is mentioned by name and his example is offered as an object lesson. See Commonwealth v. Frazier, supra, at 1226 (publication of a "letter to the editor" entitled "Death to Child Killers", which pointed out that the defendant had been previously jailed on a morals charge and was on parole at the time of the murders).

Returning now to the case of Allen Davis, it is plain to see that the print and broadcast media of Jacksonville, using information served to them on a silver platter by the Jacksonville Sheriff's Department, managed to expose the community to inherently prejudicial publicity in each of the nine categories described above. All three of Jacksonville's network television stations and the city's two major newspapers all contributed substantially to the dissemination of this material.[11] [Contrast Hoy v. State, supra, in which the publicity regarding the defendant's confessions and the complained-of inflammatory articles were confined to one Clearwater newspaper, apparently with a considerably smaller circulation than the St. Petersburg newspaper serving the same county; and in which (unlike the present case) the voir dire affirmatively demonstrated that none of the jurors who heard the cause had seen the articles in the Clearwater paper or had any knowledge of the murders beyond the fact that they had occurred].

In Henley v. State, 576 S.W.2d 66, 71, 72 (Tex. 1978), the Texas Court of Criminal Appeals, citing to Rideau v. Louisiana, supra, observed that regardless of the successful qualification of a jury panel, the evidence adduced during the pre-trial change of venue hearing may require that a change of venue be granted in order to assure the accused

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[11] For example, the Journal, the Times-Union, Channel 4, and Channel 17 all reported that Davis took a polygraph examination; of these four sources, only the Times-Union neglected to specifically mention that he failed it, and even that newspaper pointed out in the next sentence that he was arrested and booked that night. The Journal and the Times-Union published his criminal record in some detail, while Channel 4 and Channel 17 described it respectively as "lengthy" and "convicted twice and released from Raiford." Channel 12 broadcast the Rothstein "piece" casting blame for the killings on Davis' parole release. All three TV stations, as well as the Journal, publicized Davis' alleged statements placing him in the Weiler house around the time of the murders.

a fair and impartial trial. The court, at 71-72, said:

> Some relevant factors in determining whether outside influences affecting the community climate of opinion as to a defendant are inherently suspect are (1) the nature of pretrial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire.

The criteria mentioned in Henley are worth examining in the present case. The first and most important factor, the nature of the pre-trial publicity, has already been discussed in some detail. Its capacity for prejudice was enormous, especially the disclosure of the fact that Davis failed a polygraph examination - a fact which is (a) inadmissible at trial [see e. g. Codie v. State, 313 So.2d 754 (Fla. 1975)], both because it is (b) unreliable [see e.g. Farmer v. City of Fort Lauderdale, 427 So.2d 187 (Fla. 1983)], and because, as a result of its "almost mythical aura" of objective science, it is (c) likely to be taken by jurors as conclusive evidence of guilt [see Farmer v. City of Fort Lauderdale, supra, at 191; State v. Catanese, 368 So.2d 975, 981 (La. 1979); Akonom v. State, 394 A.2d 1213, 1219 and n.3 (Md. App. 1978)]. Since this smorgasbord of inadmissible evidence, circumstantial incrimination, and emotional reportage was rather evenly distributed among the community's three major TV stations and two major newspapers, and considering the audience surveys and circulation figures of these news sources in conjunction

with the population of Duval County, it is clear that the prejudicial publicity circulated in the community to a very substantial degree.

Second, the greater part, and the most damaging part, of the prejudicial publicity in this case was directly attributable to the Jacksonville police. According to defense attorney Zebouni's affadavit, employees of the Sheriff's Department handed out copies of the arrest report, which contained references to Davis' having failed a polygraph and to his statements placing him in the victims' home and claiming a loss of memory, to T.V. and radio personnel at the bond hearing (R-208, see R-2). The Jacksonville Journal wrote "The suspect agreed to take a lie detector test and failed it, officers said. They declined to reveal the test questions" (R-51). Many of the prejudicial disclosures in the articles and broadcasts were prefaced "According to the police..." (T-145)(statements and polygraph); "[T]he police said Davis told them...." (T-147) (statements); "Police said he voluntarily submitted..." (T-162) (polygraph); "Police say they found cord...." (T-146); "The police believe the gun to be...." (T-148); "Homicide Detective Charles Kesinger said Davis told him...." (R-51) (statements); "... said homicide Detective Jim Suber" (R-54) (polygraph); "Sources close to the investigation say ..." (T-148) (gun). In addition to the polygraph results and inculpatory statements, the police released the information that Davis' father's .357 caliber revolver was missing, and they believed it to be the same type of gun the suspect used (T-146, 148); and that nylon cord found in Davis' truck was believed to be identical to the cord used to tie Kristy Weiler's wrists (T-146,148,162).

One official, apparently Lt. Suber, was shown on Channel 4 saying "There might have been some doubt in people's minds, there was no doubt in our mind now that we have the right suspect." (T-147). It is interesting

to note the one aspect of this case which the police were vigilant not to reveal - namely, the locations where divers were searching for the gun:

> Suber said any comments could hinder the investigation and that if anything were printed, a guard would be placed in the area being searched to prevent anyone from tampering with evidence that might be found there.
>
> * * * * * *
>
> Suber said his fears were not that another suspect might be at large, but that relatives or friends of Allen Lee Davis, the 37 year old shipyard welder charged with the triple slayings could try to prevent investigators from discovering evidence.
>
> (Defendant's Exhibit 4, p. 12).

In one fell swoop, Lt. Suber managed to publicly imply, with no apparent foundation, that Davis or his relatives[12] and friends would try to tamper with the evidence if given half a chance (and therefore he must be guilty[13]), and to publicly express his absolute certainty that the police had the right suspect in custody.

Numerous appellate courts, including this one, have condemned the practice of the police or prosecution "trying the case in the media."

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12 Ironically, it was a close relative of Davis', his father Donald Davis, whose voluntary and largely unsolicited cooperation enabled the police to focus so quickly on Davis as a suspect, and whose testimony as a state witness at trial was instrumental in securing a conviction.

13 Note that tampering with evidence (where the defendant actually does it, as opposed to police merely speculating that he might do it) would be admissible in evidence as tending to show consciousness of guilt. See Daniels v. State, 108 So.2d 755, 760 (Fla. 1959); Mackiewicz v. State, 114 So.2d 684, 689 (Fla. 1959).

This Court said in Singer v. State, supra, at 16-17, and repeated in Manning v. State, supra, at 277:

> Prosecuting officials, being lawyers, are strictly prohibited . . . from making for publication statements which pertain to pending or anticipated litigation for the reason that such statements may interfere with a fair trial. All prosecutors must observe this canon and the courts must enforce its observation.
>
> Law enforcement officials likewise must be required to abstain from making pre-trial statements regarding the details of crimes under investigation by them, which statements tend to establish the guilt or innocence of one accused of the crime. There is nothing to prevent announcement of the commission of a crime or of an arrest of one suspected of committing it, but they should not publish matters relating to evidence which they have acquired, statements attributed to witnesses, or statements or confessions attributed to an accused. Publication of such statements, evidence or confession forms the basis for trial by newspaper. Further, such statements, evidence or confession either may not be submitted at the trial, or if offered may not be admitted, yet if those who sit on the jury have read the press version of them it is most difficult, if not impossible, for the human mind not to fill in from its extrajudicial knowledge that which is not offered at the trial or to determine the veracity of a witness by comparing the newspaper version of the facts with the testimony given at the trial. It is a tribute to the press that most believe as true what is written or spoken by the press media, yet it must be admitted that press reports are not always accurate and are seldom complete. Further, the accused has no means to answer them, nor is there any appeal from conviction on trial by newspaper.

Similarly in State v. Stiltner, supra, at 1048 (in which it was revealed that the defendant, alone among the five suspects, had not taken and passed a polygraph), the Washington Supreme Court noted that disclosure of the polygraph results violated the state's Bench-Bar-Press Committee

guidelines. While recognizing that the guidelines do not have the force of law, the court also recognized that in certain instances particular violations may also violate due process. [Accord, Commonwealth v. Pierce, supra, at 215]. The court noted:

> It must be made clear that the ultimate constitutional responsibility for guaranteeing a fair and impartial trial lies primarily with the judiciary, not the press. Here, the astonishing fact is that the prejudicial material publicized was not the result of overzealous news gathering and reporting, but was actually released to the news media by the state.
>
> State v. Stilner, supra at 1046 n.1

In Commonwealth v. Pierce, supra, at 214, the Supreme Court of Pennsylvania expressed similar concerns:

> It is not only the fact that the publicity was "inherently prejudicial" that troubles us about this case - it is also the source of the publicity. The information in this case was not reported as a result of independent research by the representatives of the news media - it came directly from the police. It was the authorities who released the fact that Pierce was the confessed "triggerman" with a past record, and the police who staged the "re-enactment" of the crime. Moreover, the District Attorney's Office is not free from some blame for the aroused tone of the community because his office released statements such as: "I am waiting for that misguided social worker to begin a fast and vigil at the hospital beds of these most recent victims of savage lawlessness. When the robbers are captured, I promise them a swift and very special treatment." The District Attorney's Office also refused to produce witnesses at an arraignment because of alleged telephone threats to the victims of "ultimate death."
>
> Statements such as those of the police and the prosecutor in this case create an even more substantial risk of a denial of a fair trial, because of the position in the community these individuals hold, and also suggest an official disregard of safeguards

> inherent in a fair trial. Officers of the Commonwealth and the police have a special duty and responsibility to all of the citizens of the Commonwealth. They must never lose sight of the fact that an accused has a right to a fair trial by an impartial jury, that only a jury can "strip a man of his liberty," and a man is presumed innocent until proven guilty in a court of law, and that all men are guaranteed basic rights under the Constitution.[14] [Emphasis in Court's opinion]

See also Rideau v. Louisiana, supra, at 725 (televised "interview" in which defendant confessed was carried out with active cooperation and participation of local law enforcement officers); Maine v. Superior Court of Mendocino County, supra, at 379 (one co-defendant's confession, implicating other defendant as well, released by an official of another state); Commonwealth v. Casper, 392 A2d 287, 292 (Pa. 1978)(recognizing that one of the factors in determining whether publicity is so inherently prejudicial as to warrant a presumption of prejudice is "whether such information is the product of reports by the police and prosecutorial officers").

Third, referring to the length of time between the dissemination of the publicity and the trial, this would be a factor weighing in favor of the state's position in this case. The flood of prejudicial disclosures and inflammatory reporting occurred, quite naturally, at the time of the crime, and Davis' arrest for it, in mid-May, 1982. [It should be noted, however, that circumstantial incrimination through statements

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14 Another case recognizing that intense pre-trial publicity which serves up evidence (admissible and inadmissible) and opinions pointing to guilt can strip a defendant of the presumption of innocence to which he is constitutionally entitled is Corona v. Superior Court for County of Sutter, supra, at 417. See Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

of the evidence in the media was still occurring in June, and the incredibly prejudicial Rothstein "piece" was aired in July (see T-172-73)]. The jury was selected on January 31, 1983 and the trial ran from February 1-4, 1983. Eight and one-half months had elapsed between the worst of the publicity and the trial. However, the weight which should be accorded this factor is considerably diminished by the fact that nine potential jurors, and three of the actual trial jurors, stated that they had some knowledge of the case, and as a result of the denial of the defense motion for individual and sequestered voir dire [see Issue II], neither the attorneys nor the trial judge were able to determine specifically what, or how much, these jurors knew. Thus, it is impossible to conclude that a "cooling-off" period of eight and one-half months was sufficient to erase the prejudice.

Fourth, with reference to the severity and notoriety of the offense, this case involves a senseless triple murder of a mother and two young daughters, and three counts of capital murder. The state aggressively sought the death penalty, and got it. It is hard to imagine a more severe or notorious offense. See Martinez v. Superior Court of Placer County, supra, at 506-07, holding that the nature and gravity of the offense of capital murder is a primary consideration in requiring a change of venue, and rejecting the Attorney General's argument that the charged offense in that case "[did] not compare to the bizarre, heinous, and often multiple killings" in cases where change of venue had been granted. The California Supreme Court in Martinez made it clear that it was not establishing a requirement that a change of venue be granted on request in every

capital case; the nature and scope of the publicity remains the dominant factor. The Court further observed:

> The seriousness of the charged crime stands out clearly. Murder is a crime of utmost gravity; inasmuch as the state is seeking the death penalty, it is a crime of the gravest consequences to petitioner. Because it carries such grave consequences, a death penalty case inherently attracts press coverage; in such a case the factor of gravity must weigh heavily in a determination regarding the change of venue.
>
> Martinez v. Superior Court of Placer County, supra, at 507.

"It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment". People v. Hogan, 647 P.2d 93, 112 (Cal. 1982), quoting Mattox v. United States, 146 U.S. 140, 149 (1892).

Fifth, the area from which the jury was drawn was the city of Jacksonville and the county of Duval (which, as a result of consolidation, are virtually coextensive). Duval County, with a 1980 population of 570,981, and very little suburban development outside the county limits, is one of the larger Florida counties, but by no means a metropolis. Certainly Duval County is much larger than Columbia County, where the Manning case took place. On the other hand, Columbia County does not have any network television stations within its borders, while Duval County has three, each of which accounted for a substantial portion of the prejudicial publicity, as did both of the city's leading newspapers. [Contrast Hoy v. State, supra].

The sixth factor referred to in Henley v. State, supra - other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant -

does not appear to be applicable in this case.

The seventh consideration mentioned in Henley is "any [factor] likely to affect the candor and veracity of the prospective jurors on voir dire," In the present case, there was no opportunity to question the prospective jurors outside one another's presence. Consequently, it was impossible to determine what, or how much, of the inadmissible or prejudicial information had been digested by the nine prospective jurors, and three actual jurors, who said they knew something about the case. In his concurring opinion (joined by Justices Stewart and Marshall) in Nebraska Press Association v. Stuart, 427 U.S. 539, 602 . (1976), Justice Brennan observed that, in order to protect the Sixth Amendment rights of the accused in a case where there has been incriminating publicity:

> ...the trial judge should employ the voir dire to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt. See, e.g., Ham v. South Carolina, 409 U.S. 524, 531-534 (1973) (opinion of Marshall, J.); Swain v. Alabama, 380 U.S. 202, 209-222 (1965). Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover facts that would dictate disqualification for cause. Indeed, it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information.

See also State v. Stiltner, supra, at 1048; United States v. Hawkins, 658 F.2d 279, 283 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978); Section 3.4(a), ABA Standards Relating to Fair Trial and Free Press (Approved Draft 1968).

Moreover, as was observed in Irvin v. Dowd, 366 U.S. 717, 728 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial . . . but the psychological impact requiring such a declaration before one's fellows is often its father.

See Pamplin v. Mason, 364 F.2d 1, 6-7 (5th Cir. 1966).

In view of the overwhelmingly prejudicial content of the pre-trial publicity in this case, and considering the various other factors which come into play, it is appellant's position that the evidence presented at the change of venue hearing required that a change of venue be granted, as a matter of due process. See Rideau v. Louisiana, supra; Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); Oliver v. State, supra; Pamplin v. Mason, supra; State v. Stiltner, supra; Commonwealth v. Pierce, supra. The trial court's decision, over defense objection (T-272), to defer ruling on the issue until an attempt had been made to empanel a jury in Duval County, was, under the circumstances of this case, an abuse of discretion, because the pre-trial release to the public, through the media and the police, of such a melange of inadmissible evidence, incriminating facts, statements, and circumstances, and emotionally loaded reportage was so inherently and fundamentally destructive of his right to a fair trial before an impartial jury that the voir dire process was incapable of curing it. See Rideau v. Louisiana, supra; Groppi v. Wisconsin, supra, 400 U.S. at 510; Oliver v. State, supra; State v. Stiltner, supra.

C. The Prejudicial Impact of the Pre-Trial Publicity was not Cured by the Voir Dire Examination of Prospective Jurors

Assuming arguendo that the prejudice engendered by the pre-trial publicity could have been cured by the voir dire examination, the fact remains that in this case it was not cured. For reasons that will be discussed more fully in Issue II, the trial court's denial of the defense's motion for individual and sequestered voir dire ensured that the voir dire examination would not reveal the extent to which particular prospective jurors were acquainted with the purported facts (some of them inadmissible) which were disclosed in the media. For one example, did Mrs. Richardson (who served on the jury, and who knew something about the case from the newspaper and TV (T-651)) know about Davis' failure of the polygraph test? If she did, she would have been subject to a challenge for cause without regard to her testimony that she could be fair and impartial. See State v. Goodson, 412 So.2d 1077, 1081 (La. 1982). But because each prospective juror was questioned in the presence of the others, the attorneys couldn't ask, Mrs. Richardson couldn't say, and the record doesn't reveal, whether she read or heard that particular piece of information, or whether she remembered it. [Indeed, on several occasions the prosecutor expressly told prospective jurors not to mention the specifics of what they heard, but only whether they thought it (whatever it was) would interfere with their ability to be fair and impartial (T-560-61, 601-02)]. It is well recognized that where a juror has been exposed to prejudicial publicity, his assurances that he can be impartial and give the defendant a fair trial are not necessarily dispositive. Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); Singer v. State, supra at 24; Leon v. State, 396 So.2d 203, 205 (Fla.

3rd DCA 1981); People v. Boudin, supra, at 305; State v. Goodson, supra, at 1080. Where the nature of the publicity as a whole raises a significant possibility of prejudice, and a juror acknowledges some exposure to that publicity, it is the responsibility of the trial court, not the juror himself, to make the ultimate determination of whether his impartiality has been impaired. United States v. Hawkins, 658 F.2d 279, 283, 285 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978). Because the attorneys and the court in this case were unable to determine what each juror had heard or read, the trial court was unable to fulfill this constitutional responsibility. See United States v. Hawkins, supra; United States v. Davis, supra. Thus, aside from the question of whether the trial court's denial of the defense's motion for individual and sequestered voir dire was reversible error in itself [Issue II], it is clear that, as a direct consequence of this ruling, the voir dire examination of prospective jurors in this case could not begin to cure the impact of the prejudicial publicity, or obviate the necessity for a change of venue.

The state is likely to contend that the fact that defense counsel accepted the jury without renewing his motion for a change of venue and without exhausting his peremptory challenges[15] waived his right to a change of venue. In anticipation of such an argument, appellant would point out:

1) So did Manning's lawyer. Justice Alderman, dissenting in Manning v. State, supra, pointed out that defense counsel there accepted the jury without renewing his motion for change of venue or exhausting his peremp-

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15 The defense was permitted thirteen peremptory challenges, and used twelve of them. At lease three jurors who admitted to having some knowledge about the case served on the jury. Contrast Hoy v. State, supra (defense permitted forty peremptory challenges and used twenty-five; voir dire affirmatively demonstrated that none of the jurors who heard the case hadacquired any potentially prejudicial information).

tory challenges, and stated "[I]t would appear to us that we have a fair and impartial jury here." Yet the majority of this Court concluded that under the circumstances of the case, the trial court abused its discretion in failing to grant a change of venue, and reversed Manning's conviction for a new trial in a location other than Columbia County. Even Justice Alderman's dissent, while pointing out that the motion was not renewed prior to acceptance of the jury, does not appear to express the view that Manning's right to a change of venue was waived or not preserved for review; rather, the dissent appears to consider defense counsel's apparent satisfaction with the jury as a factor supporting its position that the trial court's determination that a fair jury could be selected in Columbia County was not, under all the circumstances of the case, an abuse of discretion. The publicity in the present case, while not as concentrated as that in Manning, had even more capacity for prejudice, in that it conveyed such a broad variety of information, speculation, and opinion - all strongly tending to establish Davis' guilt - much of which was inadmissible at trial precisely because of its capacity for prejudice (e.g., his prior criminal record and parolee status) and its unreliability (e.g., the polygraph results).

2) The primary thrust of appellant's argument is that he was entitled to a change of venue, as a matter of due process, on the basis of the evidence adduced at the change of venue hearing, without regard to voir dire. The trial court's decision to defer his ruling until an attempt had been made to select a Duval County jury was objected to by the defense (T-272), which adhered to its position that the damage had already been done, and that a change of venue was necessary to ensure a fair trial (T-223, 272). When Frank Tassone replaced the Public

Defender's office as appointed counsel, he adopted a number of motions previously filed on behalf of the defendant, including the motion for change of venue and the motion for individual and sequestered voir dire (R-269). Therefore, the issue of whether a change of venue was constitutionally required on the basis of the evidence presented at the hearing, without regard to voir dire, is fully preserved. The only real question regarding the voir dire is whether it cured the trial court's error in refusing to grant the change of venue; the answer, appellant submits, is that it could not and did not.

3) Finally, it must be emphasized that ".... to safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979); see Sheppard v. Maxwell, supra; United States v. Hawkins, supra, at 285. In the present case, the trial court could have fulfilled this obligation by granting a change of venue; conceivably, he might also have been able to fulfill it had he granted the defense's motion for individual and sequestered voir dire, but he did neither. All of the newspaper articles and videotaped news broadcasts in which the prejudicial publicity was contained were brought to the trial court's attention at the hearing. The trial court was aware that nine prospective jurors had been exposed to that publicity, and he was aware that the voir dire examination did not reveal what they had read, what they had heard, what they knew, or what they remembered. He had every opportunity to take protective measures to safeguard appellant's right to a fair and impartial jury. In the much different context of requested jury instructions, which do not ordinarily reach to the fundamental integrity of the trial, and with

regard to which the trial court is not necessarily under an affirmative constitutional obligation to safeguard the defendant's rights, this Court has observed:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.
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> Castor v. State, 365 So.2d 701, 703 (1978).

In the present case, the defense moved for a change of venue, presented a great deal of evidence that there was a compelling need for a change of venue, objected to the failure to grant it, and moved for individual and sequestered voir dire.[16] The trial court was fully on notice of the serious impediment to appellant's right to a fair trial which had been created by the prejudicial publicity, and he had both an opportunity, and a constitutional obligation, to take corrective action.

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[16] Contrast In re Miller, 109 Cal. Rptr. 648, 653-54 (Cal.App. 1973), holding that under the circumstances of the case, trial counsel's "failure to bring all of the pertinent factors to the [trial] court's attention, to supply the court with articles of the pretrial news coverage or transcripts of radio broadcasts and television telecasts or opinion polls, or to request judicial restriction on the dissemination of prejudicial information through statements of attorneys, law enforcement officers or court personnel" was "a grave omission [which] may have deprived the defendant of his constitutional right to have his trial held in a neutral forum."

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE.

Shortly after appellant was indicted, the defense filed a motion for individual and sequestered voir dire, in which it requested the trial court to order that prospective jurors be questioned individually and out of the hearing of other prospective jurors, for the purposes of ascertaining their knowledge of the case based on pre-trial publicity and discerning their attitudes toward capital punishment. The motion stated, inter alia, the following grounds:

> A. In order to obtain a fair and impartial jury, it is absolutely essential to inquire of each prospective juror about his knowledge of the offense, the parties, and the witnesses. It is necessary to inquire what the venireman's knowledge is and to ask questions to determine how that knowledge will affect his deliberations.
>
> 1. By explaining what he has heard about the charges or what he knows about parties or witnesses, a venireman may very likely impart his knowledge to the other prospective jurors unless there is individual, sequestered voir dire. Such knowledge, which is often based on opinion, rumors, hearsay, media coverage, and other sources of inadmissible evidence, can taint the entire venire that is exposed to it and serve to deny the Defendant a fair trial by an impartial jury. See Russ v. State, 95 So.2d 594 (Fla. 1957); Moncur v. State, 262 So.2d 688 (2 DCA 1972); Marrero v. State, 343 So.2d 833 (2 DCA 1977); Kelly v. State, 371 So.2d 162 (1 DCA 1979).
>
> 2. Whenever there is believed to be a significant possibility that individual talesman will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. Standard No. 3.4, American Bar Association, Standards Relating to Fair Trial and Free Press; U.S. ex rel. Doggett v. Yeager, 472 F.2d 229 (3 CCA 1973)
>
> (R-142).

Immediately prior to jury selection, defense counsel called the trial court's attention to the pending motions for individual and sequestered voir dire and for additional peremptory challenges (T-532). The court denied the motion for individual and sequestered voir dire, and granted each side three additional peremptory challenges (T-532).

Although a trial court has broad discretion in its conduct of voir dire, this discretion is limited by the requirements of due process. United States v. Hawkins, 658 F.2d 279, 283 (5th Cir. 1981); United States v. Gerald, 624 F.2d 1291, 1296 (5th Cir. 1980). See also United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981) (exercise of trial court's discretion in conduct of voir dire is limited by "essential demands of fairness"). In order to satisfy the requirements of due process, the method of voir dire adopted by the trial court must be capable of giving reasonable assurance that prejudice would be discovered if present. United States v. Hawkins, supra, at 283, 285; United States v. Gerald, supra, at 1296; United States v. Nell, supra, at 1229; United States v. Chagra, 669 F.2d 241, 253 (5th Cir. 1982). In view of the volume of prejudicial publicity and pre-trial disclosure of inadmissible evidence in the present case, the trial court's ruling, and the consequent examination of the prospective jurors in each other's presence, virtually guaranteed that any prejudice created by the publicity would not be discovered.

In State v. Stiltner, supra, the case in which it was revealed in the press that all suspects but the defendant had taken and passed a polygraph examination, both the trial court and the Supreme Court of

Washington recognized the "Catch-22" faced by defense counsel in trying the ferret out the prejudice created by pre-trial disclosure of such inadmissible material. The trial judge in Stiltner had said:

> Now this court recognizes the dilemma that Mr. Roy [defense counsel] is put in this matter and should comment, it seems to me, at this point. He is in a position where he must ask a juror whether or not he remembers a certain thing that he doesn't want him to remember and by doing so he may quicken or refresh that memory as to a newspaper article that may otherwise have been forgotten.
>
> State v. Stiltner, supra, at 1048.

In the present case, counsel obviously could not ask a prospective juror if he had read or heard that Allen Davis failed a polygraph, or admitted being in the Weilers' home, or had served time for several armed robberies, without conveying to the juror and the rest of the venire the very information they hopefully did not know. [This is one of the main reasons why the inherently prejudicial publicity could not be cured by voir dire, and a change of venue was constitutionally required, State v. Stiltner, supra; Issue I, infra]. But if counsel had been permitted to examine the prospective jurors outside one another's presence, then at least they could have asked each juror what he knew about the case without running the risk of the juror's honest answer contaminating the entire venire. With so much inadmissible evidence let loose in the community before trial, and with at least nine prospective jurors admitting to some exposure to the publicity, the chances of something like this occurring were excellent. So neither the attorneys nor the court ever determined the nature or extent of the extrajudicial knowledge which these prospective jurors brought with them to court. The prosecutor twice indicated to the jurors that he did not want to know the details

of what they read or heard, but only whether they thought it would interfere with their ability to be impartial (T-560-51, 601-02). Given the fact that the jurors were being questioned in each other's presence, such caution was prudent. But this method of voir dire did not "give reasonable assurance that prejudice would be discovered if present", and did not adequately protect appellant's right to a fair and impartial jury. United States v. Hawkins, supra; United States v. Davis, 583 F.2d 190 (5th Cir. 1978).

In State v. Goodson, 412 So.2d 1077 (La. 1982), the Supreme Court of Louisiana concluded that the defendant had failed to establish that the publicity in his case was of such a character as to create a presumption of prejudice which would require a change of venue without regard to voir dire. With respect to actual prejudice, the court noted that, as there had not yet been a voir dire examination, it was impossible to determine whether it existed or not. The court remanded the case to the trial court with instructions to defer ruling on a change of venue until completion of voir dire. Because serious questions of potentially prejudicial publicity were involved, the court further instructed the trial court that the voir dire should be conducted according to the following guidelines, based upon Section 8-3.5, American Bar Association Standards Relating to Fair Trial and Free Press:[17]

> Since there is a significant possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror

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17 With reference to the A.B.A. Standard, see also United States v. Hawkins, supra, at 283; United States v. Davis, supra, at 196,197-98.

with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

Both the degree of exposure and the prospective juror's testimony as to state of mind are relevant to the determination of acceptability. A prospective juror testifying to an inability to overcome preconceptions shall be subject to challenge for cause no matter how slight the exposure. If the prospective juror remembers information that will be developed in the course of the trial, or that may be inadmissible but does not create a substantial risk of impairing judgment, that person's acceptability shall turn on the credibility of testimony as to impartiality. If the formation of an opinion is admitted, the prospective juror shall be subject to challenge for cause unless the examination shows unequivocally the capacity to be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.

State v. Goodson, supra, at 1081.

If, in the instant case, the motion for individual and sequestered voir dire had been granted, counsel would have been able to ask each prospective juror, "Specifically, what have you read or heard about this case?" If a juror answered "I heard he flunked a lie detector" [such information being highly inculpatory, notoriously unreliable, and wholly inadmissible], that juror would have been immediately subject to a challenge

for cause, without regard to his own assessment of his ability to be impartial. State v. Goodson, supra. See Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); Singer v. State, 109 So.2d 7, 24 (Fla. 1959); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981). If another juror said, "The only thing I remember is something about his father's gun being missing", that juror would not necessarily be disqualified if the trial court found his assurances of impartiality to be credible, but his extrajudicial exposure to facts and circumstances of the case might strongly influence counsel's decision whether or not to expend a peremptory challenge. If a third juror said "I just remember hearing on TV that it happened", such minimal exposure would presumably be of little consequence to anyone [See Hoy v. State, supra].

Three of the people who served on appellant's jury acknowledged having some extrajudicial knowledge about the case. Considering the character of the pre-trial disclosures made by the police and the media, there is a distinct possibility that some of this knowledge was inadmissible in addition to being highly prejudicial; such knowledge on the part of a juror, if revealed on voir dire, would have made him subject to a challenge for cause. Yet the method of voir dire used in this case virtually ensured that such knowledge, if it existed, would not be revealed. Consequently, the trial court's denial of the defense's motion for individual and sequestered voir dire not only deprived appellant of due process [United States v. Hawkins, supra; United States v. Davis, supra], it also impaired, indeed effectively destroyed, his ability to exercise his challenges for cause and his peremptory challenges in a reasonably intelligent manner. See United States v. Rucker, 557 F.2d 1046, 1048 (4th Cir. 1977), in which the appellate court observed that "a defendant is entitled to have sufficient information brought out

on voir dire to enable him to exercise his challenges in a reasonably intelligent manner", and further stated:

> While the conduct of a voir dire examination is a matter within the broad discretion of the trial judge, Ristaino v. Ross, 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973); Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931), the exercise of that discretion is limited by "the essential demands of fairness." Aldridge, supra, at 310, 51 S.Ct. 470. A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice. Swain v. Alabama, supra, 380 U.S. at 219, 85 S.Ct. 824; United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972).
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> United States v. Rucker, supra, at 1049.

See also United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982); Carr v. Watts, 597 F.2d 830, 833 (2d Cir. 1979); United States v. Turner, 558 F.2d 535, 538-39 (9th Cir. 1977) (impairment of defendant's right to exercise peremptory challenges is reversible error, irrespective of prejudice); United States v. Mobley, 656 F.2d 988, 990 (5th Cir. 1981); State v. Morrison, 557 SW.2d 445, 446-47)(Mo. 1977)(defendant is entitled to a full panel of qualified jurors and to his full complement of genuinely peremptory challenges, and cannot be forced to "trade-off" one of these rights for the other; consequently, the erroneous denial of a challenge for cause is reversible error notwithstanding the fact that the defense may have used one of its peremptory challenges to remove the juror, or may not have exhausted its peremptory challenges).

Where there has been potentially prejudicial media coverage in a criminal case, and where a significant possibility exists that a juror

may be ineligible to serve because of exposure to such publicity, it is the obligation of the court, not the juror, to determine whether the juror's impartiality has been destroyed. United States v. Hawkins, supra, at 285; United States v. Davis, supra, at 197. In order to meet this responsibility, the court must at least determine (through his own questioning or that of counsel) "what in particular each juror had heard or read and how it affected his attitude toward the trial." United States v. Hawkins, supra, at 283, 285; United States v. Davis, supra, at 196-97; State v. Goodson, supra, at 1081; see also United States v. Chagra, supra, at 253-54. The trial court is under an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. Gannett Co. v. DePasquale, supra; Sheppard v. Maxwell, supra; United States v. Hawkins, supra. Instead, the manner in which the voir dire examination was conducted in the instant case was not only ill-equipped to minimize the effects of the publicity, it actually served to insulate whatever prejudicial information the jurors might have had from coming to light. The method of voir dire utilized by the trial court was clearly not, under the circumstances of this case, "capable of giving resonable assurance that prejudice would be discovered if present " [United States v. Hawkins, supra; United States v. Gerald, supra], and reversal for a new trial is therefore required.

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR LANE.

During the voir dire examination, the following colloquy occurred:

> MR. TASSONE [defense counsel]: Okay. Mrs. Lane, during the course of some of the questions that Judge Harding asked, I wrote down the fact or wrote down your number and it may be incorrect but you had some knowledge about this particular case. Was that incorrect?

MRS. LANE: Just watching televison.

MR. TASSONE: Okay. And that particular knowledge, would that prevent you from sitting as a fair and impartial juror in this particular case?

MRS. LANE: Well, I have mentioned emotions; I know what I feel about it and not very much.

MR. TASSONE: Well, all right. You have your own particular emotions in connection with this case.

MRS. LANE: Yes.

MR. TASSONE: Okay. And that, I assume, comes from news accounts, is that correct?

MRS. LANE: Right. Right.

MR. TASSONE: If the Judge were to instruct you that any evidence or any -- that your verdict will be based solely on the evidence and testimony as it comes from the witness stand, would you be able to separate that? And it is a difficult thing to ask, to sit there and say well, no, I might have known this from a newspaper account as opposed to what occurred on the witness stand.

MRS. LANE: Well, in your home, in your discussions, with your husband and all, you say I think such and such and I don't know whether I should serve or not.

MR. TASSONE: Well, in the final analysis, my question would be: Could you give Allen Lee Davis a fair trial or do you have a preconceived notion of guilt or innocence that you would not be able to set aside to give either Mr. Davis or the State of Florida a fair trial?

MRS. LANE: Well, I still say I have my feelings. I feel that I know in my heart how I feel.

MR. TASSONE: Well, this is like Mr. Austin explained to you, this is the only opportunity that the attorneys have of questioning the prospective jurors and, obviously in a case of this nature, Mr. Davis is charged with three counts of first degree murder and your have heard the State Attorneys say that they would be asking the jury to recommend death. Okay. And this is very important to Mr. Davis and I don't mean to be questioning you to such an extent but it's very important; could you give Mr. Davis a fair trial and if you'd like some time to think about that, I will come back to you? If you can answer it now?

MRS. LANE: Well, I guess I can give him a fair trial but, really, I know how I feel about it.

MR. TASSONE: Okay. Have you made up your mind as to this particular case?

MRS. LANE: More or less.

(T-644-46).

Shortly thereafter, defense counsel challenged Mrs. Lane for cause on the ground that she could not render a fair and impartial verdict (T-667). The trial court said:

> She said that initially but then the last time you inquired of her, she said that she could listen to all of the evidence and render a verdict based on that, so I will deny your motion.
>
> (T-667).

The prosecutor chimed in, "I think she was confused but when she understood, I think she said she could be a fair and impartial juror." (T-667).

Defense counsel at that point exercised six of his peremptory challenges, one of them on Mrs. Lane (T-667-68).

It should first be pointed out that even if the trial court and the prosecutor had been correct in recalling that Mrs. Lane said she could be fair and impartial and could render a verdict based on the evidence, she still would have been properly subject to a challenge for cause, as a result of the obvious incompatibility of those bland assurances of impartiality with her statements that she had emotions about the case from watching news accounts on television, that she knew in her heart how she felt, that she had discussed the case with her husband and didn't know whether she should serve on the jury, and, most of all, that she had already "more or less" made up her mind about the case.

In Singer v. State, 109 So.2d 7, 24, this Court said:

> [A] juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

See also Irvin v. Dowd, 366 U.S. 717 (1961); Johnson v. Reynolds, 121 So. 793, 796 (Fla. 1929); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981).

Mrs. Lane would fit that description to a T, if she had said she could return a verdict according to the evidence, but in fact she didn't even say that. Mrs. Lane only spoke two sentences after her admission that she had already more or less made up her mind. She was asked whether she would attach any special significance to the fact that State Attorney Ed Austin was participating in the trial, and she said "No". (T-657). And when the prospective jurors were asked whether the fact that the victims were a mother and her two children would prejudice them to the point that they could not give Allen Davis a fair trial, the responses were:

MR. TASSONE: Mrs. Richardson?

MRS. RICHARDSON: No.

MR. TASSONE: Mr. Johnson?

MR. JOHNSON: No.

MR. TASSONE: Dr. Veach?

DR. VEACH: No.

MR. TASSONE: Mr. Griswold?

MR. GRISWOLD: No.

MR. TASSONE: Mrs. Lane?

MRS. LANE: I would be willing to listen to the evidence and consider it.

(T-663).

There is obviously a major difference between being able to render a verdict based solely on the evidence, and being able to "consider" the evidence. The clear implication of Mrs. Lane's remark is that she could consider the evidence along with her emotions and preconceptions about the case, which she freely admitted to having. Far from "curing" the earlier statements which amply demonstrated her bias, her basically non-responsive comment about being willing to consider the evidence essentially re-affirmed those statements. Appellant is not faulting Mrs. Lane; she was honest. But she was not qualified to serve as a juror in a case which she had already "more or less" decided based on television news accounts.

The trial court's denial of a challenge for cause which clearly should have been granted was error which requires reversal; it was neither "cured" nor waived by the fact that defense counsel did not exhaust his peremptory challenges. Any error, including an erroneous denial of a challenge for cause, which impairs the exercise of peremptory challenges is reversible error, and no showing of prejudice is required. See Swain v. Alabama, 380 U.S. 202, 219 (1965); State v. Morrison, 557 S.W.2d 445, 446-47 (Mo. 1977); United States v. Mobley, 656 F.2d 988, 989-90 (5th Cir. 1981); United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982); Carr v. Watts, 597 F.2d 830 (2nd Cir. 1979); United States v. Turner, 558 F.2d 535 (9th Cir. 1977); Worthen v. State, 399 A.2d 272, 278 n.3 (Md.App. 1979). The reasoning behind this rule was best explained in State v. Morrison, supra, at 446:

Defendant asserts the trial court erred in failing to strike venireman Sharon Pierson for cause, she having, in response to a question asking if any of the panel had read or learned about the case in the radio, newspapers or otherwise, answered, "I read about it, the previous trial", apparently referring to defendant's trial a month earlier on a similar charge, but that she had formed no opinion as to guilt or innocence. The court of appeals overruled the claim of error on the part of the trial court in overruling the challenge for cause, but, as said, did so on the ground that defendant was not in a position to raise the point because he failed to show that she served either because defendant's peremptory challenges were exhausted or else that she was removed by his exercising one of his peremptory challenges, citing State v. Londe, 345 Mo. 185, 132 S.W.2d 501, 504 (1939) and State v. Simpson, 529 S.W.2d 19, 21 (Mo. App. 1975). This holding is not correct. Under the law defendant is entitled both to a qualified panel and the statutory number of peremptory challenges. He need not sacrifice one to the other. The law was well stated by Somerville, J., in State v. Thompson, 541 S.W.2d 16, 17 (Mo.App.1976) as follows:

> This state has steadfastly hewed to the proposition that an accused in a criminal case must be afforded a full panel of qualified jurors before he is required to expend his peremptory challenges, and denial by a trial court of a legitimate request by an accused to excuse for cause a partial or prejudiced venireman constitutes reversible error. State v. DeClue, 400 S.W.2d 50 (Mo. 1966); State v. Land, 478 S.W.2d 290 (Mo. 1972); State v. Lovell, 506 S.W.2d 441 (Mo. banc 1974). This proposition is rooted in the constitutionally guaranteed right of every accused to a "public trial by an impartial jury", Mo. Const. Art. 1, Sec. 18(a), and personifies a dedicated judicial effort to preserve inviolate this constitutionally guaranteed right in the broadest sense. Experience has taught

> that it is not always possible to objectively demonstrate juror partiality. Not infrequently, juror partiality is subtle, elusive, and highly subjective. When juror partiality is capable of being objectively demonstrated, challenges for cause have been devised as a means for achieving impartial jury. When juror partiality is sensed, but incapable of being objectively demonstrated, peremptory challenges have been devised as a means for achieving an impartial jury. Together, they serve the ultimate goal of obtaining a jury free from the taint of both objectively demonstrated and subjectively sensed partiality. Purity of the right to be tried by an impartial jury is so zealouly guarded that an accused may covet his peremptory challenges and "spend" them as he alone sees fit. Therefore, if an accused is not presented with a full panel of jurors objectively demonstrated as qualified before he exercises his peremptory challenges, his given number of peremptory challenges is proportionately reduced and his right to "spend" them as he alone sees fit is accordingly impinged. The strength and integrity of trial by jury in a criminal case lies in the composite impartiality of the jury finally selected to try a particular case, and both are eroded to an unknown extent when even a single or isolated instance of partiality creeps in, whether objectively demonstrated or subjectively sensed.

On the basis of the foregoing reasoning, the court in Morrison squarely held (at 447) that in determining on appeal the propriety of a trial court's ruling on a challenge for cause, in a criminal or civil case, "it is improper to mix with it a consideration of the question as to whether or not the complaining party had exhausted his peremptory challenges."

While the decision in Morrison is based on Missouri's constitutional provision guaranteeing an accused the right to a "public trial

by an impartial jury", appellant submits that the same principles are applicable under the Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Florida Constitution. See Swain v. Alabama, supra; United States v. Mobley, supra; United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977); United States v. Brocklier, supra; Carr v. Watts, supra; United States v. Turner, supra.

ISSUE IV

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL, WHEN A STATE WITNESS ON RE-DIRECT EXAMINATION REFERRED TO APPELLANT'S POLYGRAPH EXAMINATION.

During the change of venue hearing, when defense counsel was emphasizing the extreme danger of prejudice created by the media's disclosure that appellant failed a polygraph examination, counsel argued:

> Certainly, as Your Honor is well aware, the mere mention of polygraph during a trial would result in a mistrial immediately. Yet here we have most certainly a substantial portion of our community exposed to the fact that this man has failed a polygraph by virtue of information disseminated by the media.
>
> Surely, anyone that saw or heard that would have to be excused because he could not consider the defendant's trial testimony fairly and impartially. Certainly, he could not fail to consider that or be influenced by it in some manner. The Courts have ruled that even the mention of polygraph test is so inflammatory and prejudicial that it calls for mistrial.
>
> MR. KUNZ [prosecutor]: Judge, I don't think that is an accurate statement of the law and I can state the cases but that statement is totally inaccurate, Judge.

MR. LINK [defense counsel]: Any mention of polygraph that infers what the results were is grounds for a mistrial. I think that is an accurate statement of the law, Judge.

(T-221-22).

At trial, Detective Charles Kessinger testified that during the course of his investigation of the murders, in the late afternoon of May 12, 1982, he had occasion to enter the residence of the Weilers' next-door neighbor Donald Davis, where he was introduced to appellant, Allen Davis, who is Donald Davis' son (T-1060). Donald Davis said that Allen was the last one to see the Weiler children alive (T-1061). Allen acknowledged this, and told Kessinger that Kristy Weiler had asked him to come over and help fix their bathroom door which was stuck (T-1061-62). When he went over there, around 8:00 p.m., Mrs. Weiler told him the door had already been fixed; they had a short conversation, and then he went back to his father's house for a moment, got in his truck, and left the area (T-1062). During the conversation, Donald Davis volunteered "I know this looks bad but I am missing a gun", and showed Kessinger a magazine photo of a .357 Ruger Black Hawk (T-1062). Allen "automatically" said he hadn't seen it (T-1063). Shortly thereafter, Kessinger asked Allen for permission to search his truck (T-1064). Allen consented to the search (T-1064-67). Police seized some rope from the vehicle, and a shirt (T-1067-68). Detective Kessinger testified:

The crime lab people completed their search of the vehicle, they took photographs of it and at the time I approached Allen Lee Davis who was still standing in the yard and, as I approached him, he said it doesn't look good, does it?

MR. KUNZ [prosecutor]: Did he say that in response

to any question?

DETECTIVE KESSINGER: Spontaneous statement. And I told him at that time that I felt like that we could clear the matter up if you wanted to go downtown for an interview and he said yes, I'd like to clear it up. I will go downtown.

(T-1068).

Subsequently, the state called Donald Davis as a witness. Mr. Davis testified that he normally kept his .357 Ruger pistol in a night table, but about a week or two before the murders he had placed it on top of his refrigerator (T-1265). He was going to send the pistol back to the manufacturer, to have the safety mechanism on the trigger rebuilt (T-1266). The gun was a six-cylinder revolver, and it contained five rounds of ammunition when placed on the refrigerator (T-1267-68). On May 12, 1982, Mr. Davis told Detective Kessinger that the gun was missing (T-1270). Kessinger asked Allen if he could look in his truck and Allen said to go right ahead (T-1271).

MR. AUSTIN [prosecutor]: While -- did Allen subsequently leave with the police to go to the police station?

DONALD DAVIS: Yes.

Q Do you know whether he did that freely and voluntarily or not?

A Yes, he did.

Q He did?

A I heard him tell Kessinger, "Let's go take a lie detector test and get it over with."

(T-1271).

Defense counsel immediately asked to approach the bench, and requested that the jury be excused (T-1271-72). The trial court declined to excuse the jury (T-1272). Defense counsel moved for a mistrial, noting that

the reference to the polygraph was highly prejudicial to appellant regardless of what the court might instruct the jury, and that an instruction would only highlight it (T-1272). The prosecutor asked that the jury be admonished to disregard the reference to the polygraph, and said:

> Your Honor, the witness was instructed 30 minutes ago, and I got an entirely different response when I asked the question. All I did was it freely and voluntarily, and he said yes, and that he wanted to go down and get it over with. That was the only response I elicited from this witness. I didn't even know to caution him about the polygraph.
>
> (T-1272-73).

Defense counsel said:

> I think the record should reflect, also, that during the course of the conference here at the bench with the Court and counsel for the State and defense that the jury is looking over here, obviously curious as to what's going on. I moved to approach the bench right after the statement was made, and I will submit, Your Honor, that if the Court does not grant it, the results to my client are absolutely devastating.
>
> (T-1273-74).

The trial court expressed the view that the witness' remark was not prejudicial, because "[t]here is no evidence that [a polygraph examination] was given and no evidence that there is any results" (T-1274). The court denied the motion for mistrial (T-1371), and instructed the jury, "Ladies and gentlemen, you are to disregard the last statement of the witness [in] regard to a lie detector" (T-1275).

"Absent consent by both the state and defendant, polygraph evidence is inadmissible in an adversary proceeding" in Florida. Walsh v. State, 418 So.2d 1000, 1002 (Fla. 1982); see e.g. Codie v. State, 313 So.2d

754 (Fla. 1975); Kaminski v. State, 63 So.2d 339 (Fla. 1952). Other jurisdictions either follow the same rule [see e.g. State v. Sutherland, 617 P.2d 1010, 1011 (Wash. 1980); Williams v. State, 375 N.E.2d 226, 227 (Ind. 1978)], or forbid the introduction of polygraph evidence altogether [see Akonom v. State, 394 A.2d 1213 (Md. App. 1978)]. The twin reasons for the exclusion of polygraph evidence are that it is unreliable [see Farmer v. City of Fort Lauderdale, 427 So.2d 187, 190-91 (Fla. 1983)[18]; Kaminski v. State, supra, at 340; State v. Davis, 407 So.2d 702, 706 (La. 1981)], and that it is all too likely to be taken by jurors as conclusive. See Farmer v. City of Fort Lauderdale, supra at 191 (despite its apparent shortcomings, polygraph has attained an "almost mythical aura"; results of these tests are regarded as "presumptively accurate" and "any protestations against their validity are generally viewed as being made in the obvious self-interest of those failing the test"); Akonom v. State, supra, at 1219 and n.8 (two studies

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[18] This Court observed in Farmer (at 191):

> Various reasons are given by the polygraph's detractors for its alleged unreliability. According to them, numerous factors can influence the validity of polygraph testing. Among the most often mentioned are the skill of the operator, the emotional state of the person tested, the fallibility of the machine and, perhaps most importantly, the general failure to determine a specific quantitative relationship between physiological and emotional states. In addition, it has been generally accepted that physiological factors other than conscious deception can cause deviant autonomic responses. Frustration, surprise, pain, shame, and embarrassment, as well as other idiosyncratic responses incapable of being analyzed, can cause autonomic response. Burkey, The Case Against the Polygraph, 51 A.B.A.J. 855 (1965).

show that polygraph results would be viewed by some jurors as conclusive; presumption of innocence would be threatened by "inordinate weight" likely to be given to such evidence); State v. Catanese, 368 So.2d 975, 981 (La.1979) ("Our fundamental concern is that the trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion").

Because of its "horrendous capacity for prejudice" [State v. Parsons, 200 A.2d 340, 343 (N.J. Super 1964)], any reference to a polygraph examination, which either informs the jury, or from which the jury could infer, that the defendant failed such an examination or a state witness passed one, entitles the defendant to a mistrial.[19] See e.g. Kaminski v. State, 63 So.2d 339 (Fla. 1952); Crawford v. State, 321 So.2d 559 (Fla. 4th DCA 1975), approved 339 So.2d 214 (Fla. 1976); Bollinger v. State, 402 So.2d 570, 572-73 (Fla. 1st DCA 1981).[20] Even though the polygraph

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19 In Walsh v. State, supra, the converse situation was presented. This Court held that where the jury heard that the defendant had passed a polygraph examination, the state was entitled to a mistrial. This Court agreed with the trial judge that his curative instruction was insufficient, because the jury could not adequately disregard such testimony; consequently there was "manifest necessity" to grant a mistrial.

20 See also Nichols v. State, 378 S.W.2d 335 (Tex. 1964); State v. Parsons, 200 A.2d 340 (N.J.Super 1964); State v. Clark, 319 A.2d 247 (N.J.Super 1974), aff'd 331 A.2d 257 (N.J. 1975); State v. Perry, 142 N.W.2d 573, 580 (Minn. 1966); People v. Frechette, 155 N.W.2d 830 (Mich. 1968); People v. Brocato, 169 N.W.2d 483, 490-91 (Mich. App. 1969); People v. Yatooma, 271 N.W.2d 184 (Mich.App. 1978); People v. York, 329 N.E.2d 845, 850 (Ill. App. 1975); Hembree v. State, 546 S.W.2d 235, 240 (Tenn. 1976); Vacendak v. State, 340 N.E.2d 352, 357 (Ind. 1976); Williams v. State, 375 N.E.2d 226 (Ind. 1978); Commonwealth v. Kemp, 410 A.2d 870 (Pa. 1979); State v. Edwards, 412 A.2d 983 (Maine 1980); State v. Descoteaux, 614 P.2d 179, 183-84 (Wash. 1980); State v. Sutherland, 617 P.2d 1010 (Wash. 1980); State v. Davis, 407 So.2d 702, 706 (La. 1981); Roleson v. State, 614 S.W.2d 656, 659-60 (Ark. 1981).

examination may have been referred to in the future tense, it still may be entirely capable of creating a prejudicial inference as to the result. See Crawford v. State, supra (police officer advised robbery victim that, since he was claiming such a large loss, he would have to take a polygraph examination); People v. Brocato, 169 N.W.2d 483, 490 (Mich.App. 1969)(state witnesses were asked to take polygraph examination); c.f. State v. Descoteaux, 614 P.2d 179, 183-84 (Wash. 1980)(defendant was asked on cross-examination if he was scheduled to take a polygraph examination concerning possible work release violations or criminal activity; trial court erred in allowing this question as rebuttal to defendant's direct testimony on his motive for not returning to work release facility). See also Vacendak v. State, 340 N.E.2d 352, 357 (Ind. 1976)(mention that defendant took a polygraph examination, or facts leading to this conclusion, is not permitted); State v. Perry, 142 N.W.2d 573, 580 (Minn. 1966)(facts which would indicate that defendant submitted to a polygraph examination cannot be brought to the attention of jury); State v. Clark, 319 A.2d 247, 250 (N.J. Super 1974); State v. Perry, supra, at 580 (fact that polygraph test was administered to defendant cannot be revealed to jury, either directly or indirectly); People v. Schiers, 96 Cal. Rptr. 330, 334 (Cal. App. 1971); People v. Hogan, 647 P.2d 93, 110-12 (Cal. 1982)(disclosure to jury of willingness or reluctance of accused to submit to polygraph examination is prejudicial error).

Where the jury could infer from a reference to a "lie detector" that the defendant submitted to a polygraph examination and failed it, the prejudicial effect is so devastating that an instruction to disregard it is an exercise in futility. See e.g. Walsh v. State, supra, at 1002-03 (Fla.

1982); Frazier v. State, 425 So.2d 192 (Fla. 3d DCA 1983); Dean v. State, 325 So.2d 14, 19 (Fla. 1st DCA 1975); People v. Parrella, 322 P.2d 83, 87 (Cal.App. 1958); Commonwealth v. Kemp, 410 A.2d 870, 871 (Pa. Super 1979); Akonom v. State, supra, at 1220; State v. Davis, supra, at 706, People v. Hogan, supra, at 112. In addition to the well recognized impossibility of "un-ringing the bell", the very fact that it was the defense attorney who objected to the reference to the polygraph (whereupon a side bar conference was held in the presence of, but presumably outside the hearing of, the jury, following which the jury was told to disregard it) could only reinforce the inference that the defendant must have failed the test, since he was the one trying to keep the jury from knowing about it. See State v. Perry, supra, at 580 (once jurors were apprised of facts which would indicate that defendant had submitted to polygraph examination, they "unquestionably . . . would conclude that since the test had been given and its results withheld from evidence it had been unfavorable to defendant); Nichols v. State, 378 S.W.2d 335, 337 (Tex. 1964) ("An impression must have been implanted in the minds of the jurors that the result of the lie detector test had been unfavorable to appellant or else appellant's counsel would not have objected to the question propounded by the state), cf. Kaminski v. State, supra, at 341 (adverse impressions which would be expected to flow from defense's failure to pursue inquiry as to results of polygraph test); Farmer v. City of Fort Lauderdale, supra, at 191 (protestations against validity of polygraph evidence are generally viewed as being made in obvious self-interest of those failing test).

In the present case, the trial court's rather perfunctory instruction to the jury that it should "disregard the last statement of the witness

[in] regard to a lie detector" (T-1275) was completely ineffectual to cure the prejudice to appellant's case for two reasons. First, a powerful inference that appellant failed a polygraph examination could be drawn by the jury from the reference that was made. Donald Davis said that just before appellant left the house to go to the police station with Detective Kessinger, appellant said to Kessinger, "Let's go take a lie detector test and get it over with." There is at least a mild implication in "and get it over with" that the subject of a lie detector test had been discussed, and that the suggestion to take one may have been made by the other party, namely Kessinger. This inference is strengthened considerably by Kessinger's testimony (which the jury had already heard at the time the polygraph was mentioned):

> And I told him [appellant] at that time that I felt like that we could clear the matter up if you wanted to go downtown for an interview and he said yes, I'd like to clear it up. I will go downtown.
>
> (T-1068)

The jury had also been told that appellant did in fact go to the police station, where he was interviewed by Kessinger, Lt. Derry Dedmon, and Detective Ray Smith (T-1069-80, 1193-1219), [Dedmon administered the polygraph examination, concluded that appellant was lying in his denial of having committed the murders, and confronted appellant with the results of the test (see T-424,428). These facts, appropriately, were not related to the jury in Dedmon's trial testimony]. Dedmon testified before the jury that when he first arrived at the Police Memorial Building to interview appellant, Detective Kessinger told him that appellant was not under arrest, and was not really even a suspect (T-1202). Appellant was "free to get up and walk out of [the] room anytime he wanted to" (T-1202). By about

1:45 a.m., however, after appellant had been interviewed by Dedmon, Kessinger, and Smith, he was placed under arrest for three counts of murder (T-1078). Appellant's statements to the officers grew gradually more and more incriminating; from his mid-evening statement to Dedmon - repeating what he had earlier told Kessinger at his father's house - that after he learned the door had already been fixed he had a short conversation with Mrs. Weiler and then left (T-1200-01, see T-1061-62), to his late evening admission to Kessinger that he couldn't remember everything that happened in the house (T-1076-77), to his still later admission to Smith that he "could have" taken his father's gun with him (T-1215). There was no apparent reason for appellant not to stick with his original version of the incident, other than perhaps the brilliant interrogation techniques of Dedmon, Kessinger, and Smith.

Once the jury heard that appellant had said to Kessinger, just before leaving for the police building, "Let's go take a lie detector test and get it over with," this disjointed sequence of events starts to add up. The jury could reasonably infer that Kessinger asked appellant to submit to a polygraph examination to "clear the matter up"; appellant agreed, took the test, and "failed" it; the police officers made it clear to appellant that they did not believe him; and, in response to their accusation, appellant kept digging himself in deeper and deeper. This in fact is exactly what happened, and if the jurors were paying careful attention to the evidence, it would not be too difficult for them to figure it out. Even if the jurors were not following the evidence so closely, the fact that appellant was arrested and booked that night, coupled with the adverse implications which would flow from defense counsel's objection

to the very mention of a polygraph, would likely create an inference that appellant must have failed a lie detector test.

But there is a second reason - unique to the circumstances of this case - why an instruction to disregard the witness' reference to a polygraph was necessarily ineffectual. Immediately after appellant's arrest, it was announced to the public on two of Jacksonville's three network television stations, and in one of its two major newspapers, that he failed a lie detector test; the other newspaper disclosed that he took the test prior to his arrest [see Issue I]. At least three of the jurors who heard the case had some prior knowledge of the case; one of these jurors specifically stated that she acquired her knowledge "[f]rom the newspaper and TV." (T-651). Because of the manner in which voir dire was conducted, it was never revealed what these jurors knew about the case [see Issues I and II]. Possibly one or more of them knew that appellant failed a polygraph examination; this possibility is one of the main reasons why a change of venue should have been granted, and why prospective jurors should have been questioned outside each other's presence. But it is also possible that one or more of the jurors heard or read that appellant failed a polygraph examination, but had forgotten this piece of information by the time of the trial. In that event, the reference to appellant's statement to Kessinger, "Let's go take a lie detector test and get it over with," would have a powerful tendency to refresh their memories.

The fact that appellant failed a polygraph examination was disclosed prior to trial by the police and disseminated throughout the community by the media. The state, in successfully opposing a change of venue despite this and many other instances of prejudicial media coverage, assumed the

risk that an inadvertent remark by one of its own witnesses would open a can of worms, and necessitate a mistrial. Appellant submits that, under the circumstances of this case, the strong likelihood that members of the jury either 1) reasonably inferred from Donald Davis' reference to a lie detector test, 2) recalled, as a result of the witness' reference, coupled with their exposure to media coverage, or 3) knew all along from the media, that appellant failed a polygraph examination, deprived him of the presumption of innocence to which the accused in a criminal trial is constitutionally entitled. See Kaminski v. State, supra, at 341; see also Taylor v. Kentucky, 436 U.S. 478, 483-485(1978); Estelle v. Williams, 425 U.S. 501, 503 (1976).

ISSUE V

THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL, AND THOROUGHLY IMPROPER ARGUMENT TO THE JURY RENDERED APPELLANT'S PENALTY PROCEEDING FUNDAMENTALLY UNFAIR AND CONSTITUTIONALLY INTOLERABLE.

In Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir. 1983), it was recognized that prosecutorial misconduct in closing argument can be "so egregious as to render the trial fundamentally unfair", and that such misconduct can be of constitutional magnitude. [See also Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Miller v. State of North Carolina, 583 F.2d 701 (4th Cir. 1978); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975)]. The court noted that among the factors to be considered in determining whether alleged prosecutorial misconduct amounts to a deprivation of constitutional rights are:

> (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury, and except in the sentencing phase of capital murder trials, (4) the strength of the competent proof to establish the guilt of the accused.
>
> Hance v. Zant, supra, at 950, n.7

The court then discussed the prosecutor's argument to the jury in Hance's sentencing hearing, and concluded that his inflammatory remarks were deliberate, extensive and highly prejudicial to the defendant. Hance v. Zant, supra, at 953, n.12.

> This dramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death. A sentence of death imposed after such an appeal cannot be carried out. The sentencing hearing in this case was fundamentally unfair and therefore constitutionally intolerable.
>
> Hance v. Zant, supra, at 952-53.

The argument to the jury on behalf of the state, in the penalty phase of the instant case, was presented by State Attorney T. Edward Austin. The twin emotional poles of his approach were to caricaturize appellant as some form of sub-human creature, and to play upon the jury's identification and sympathy for the Weiler family. He opened this theme almost immediately, saying "This man, if you want to call him a man, planned to go over to the Weiler home" (T-1806). Mr. Austin continued:

> He took a rope with him, took his rope from his truck with him, he went into that house and he bound a nine-year-old child on the eve of her tenth birthday and brutally shot her in the head and in the body and killed her. And he mutilated a devoted mother. And I submit that the evidence shows she was a devoted mother: what she was doing, where the children were coming from, what the children were planning to do. And he killed another five-year-old child as she was fleeing from that horrible scene, having walked in on that monster, having walked in on that monster and in her bedroom and their bedroom, in their home, and she was fleeing in what had to have been terror, and he shot and killed her and, not being satisfied after she was dead, went back and battered and beat on her some more.
>
> (T-1807)

After referring to "this man's state of mind and his intent, and I use the word man advisedly" (T-1808-09), Mr. Austin told the jury, in effect, that they were deciding the fate of the single worst criminal in the history of the world:

> We have reached a new level of criminality. We are at a different level in this case, a new low in the barbaric senseless murder of a mother and two innocent children in their own home, in their own nest, not bothering a soul, going about their business and being senselessly murdered. Children of tender years. It's a base new low kind of criminality. It's unique in criminality. It's that horrible, it's that horrible.
>
> (T-1809)

After explaining to the jury why, in his opinion, the legislature enacted the death penalty statute and why, in his opinion, the courts

have held it to be constitutional (T-1810-11), and after a brief interlude of reasonably proper argument (T-1812-16), Mr. Austin resumed his inflammatory tactics:

> I mean, can anyone imagine, think of the horror, the terror, of the fear that raced through the mind of Nancy Weiler when she saw that murderer, when she saw that monster in her bedroom. Think of the awful terror in that child's mind as she was running away and the child in the middle of a bed with her hands tied behind her back and with that animal staring down on her. Terror. Stark terror.
>
> (T-1817)

Mr. Austin then paid a gratuitous backhanded compliment to defense counsel, saying "...Mr. Tassone is to be congratulated for doing the best he could to challenge the state as he should have to prove this case beyond and to the exclusion of every reasonable doubt...and he did that very well, very skillfully...." (T-1824) However, according to the prosecutor, the only thing proved by the three character witnesses put on by the defense was that when appellant "was around those people, he acted like a human being." (T-1824)

Mr. Austin then expressed his opinion that the state's expert witnesses - specifically Mrs. Henson, the "rope expert", and Mr. Havekost, the F.B.I. neutron activation analyst - "have done their duty and done it very well. As a matter of fact, brilliantly. Brilliantly." (T-1826). He told the jury that he could brag about the performance of his assistant, Mr. Kunz, who was lead counsel in the guilt phase; his performance in marshalling the evidence and exhibits was also described as brilliant. After complimenting the judge as having conducted a fair trial and having done his duty, the prosecutor had these words for defense counsel:

> Mr. Tassone did his [duty]. He didn't have too much to work with; as a matter of fact, when it comes down to the bottom line, he didn't have anything to work with

but he did his duty to defend his client under our system of justice. He did it very ably and he did it the best he could.

(T-1827)

Approaching the end, the prosecutor's already inflammatory and improper argument degenerated into a full-fledged emotional tirade:

> Ladies and gentlemen, the [opponents] of the death penalty talk about the sanctity of life, the sanctity of human life and don't take a life because life is sanctified and it's wrong for the State to take a life because of the value in our society that we put on it. But I ask you about the sanctity of Nancy Weiler's life. I ask you about the sanctity of Kathy and Kristy Weiler's lives. How can society ever show, ever demonstrate what value we place on human life if we don't extract it and take it out and kill whoever does the awful thing that was done in this case? How can society ever express its indignation and its outrage if it doesn't do it in a case like this by demanding death?
>
> I know death is an awful subject. I told you that last week. It's unpleasant for me, unpleasant for Mr. Kunz and the Judge. It's unpleasant to all of us but we live in a society that says an American citizen, citizens of Florida, citizens of Jacksonville, have a right to be in their homes, have a right to be secured, to be safe.
>
> Look at this picture of this living room, ladies and gentlemen, with those shoes laying in front of the fireplace. That is the most sacred institution in the world, the most sacred institution in the world: the home of the American citizen and that monster violated the home of those people when he killed them. He took Kathy -- that is Kathy (indicating) -- Kristy (indicating) -- and Nancy (indicating). And he did this to them (holding up photographs). That's what he did. That's what he did in Jacksonville, Florida, on May 11, 1982.
>
> Now in our place right now in society where we are and where are we, ladies and gentlemen? If you don't exact the death penalty in this case, there's no case where it will ever be. <u>There has never been a more horrible crime in Duval County or anywhere else than taking the lives in their homes of people that are wonderful</u>, that are defenseless against a three-hundred-and-fifty-pound bully, armed, that comes into their house and terrorizes them.

If you go through the annals of criminality, you will never find a worse factual situation than we have here, killing innocent children and an innocent devoted mother. I don't know of any other way that you can show the outrage. You are the conscience of this community, you are the conscience of our society as you sit there now, as twelve jurors, and the only way that our society and our conscience can be addressed to the demand that no innocent member of society be subjected to this type activity is to demand it.

I don't care, we have all kind of fancy theories about the death penalty deterring other criminals. I don't care about those things. I don't care about those standards, ladies and gentlemen. This man needs to be put to death for killing Nancy, Kathy and Kristy Weiler and for no other reason.

Society should blame his death for no other reason than what he did. Ladies and gentlemen, I am through. I thank you again, on behalf of Mr. Kunz and myself and on behalf of the people of the State of Florida for your attention. If I said anything up here that's been too loud and pounding on the table and pounding on the table, I'm sorry. I didn't do it to offend you but this is important what you do here today, what you do here today is important and just forget what I say and how I say it, if I'm too loud and too emotional. When it's all over, Mr. Tassone has the next time and listen to him carefully because he is going to try to make this creature look human this morning, this monster that killed those beautiful bodies that you looked at but listen to him very carefully.

(T-1827-30)

The prosecutor closed by asking the jury for a unanimous recommendation of death - "...I do more than ask you, I plead with you and beg you to make it a unanimous recommendation of death on behalf of the people of the State of Florida" (T-1831).

As in Hance v. Zant, supra - even more so than in Hance v. Zant - the prosecutor's argument, from beginning to end, was replete with inflammatory remarks which were deliberate and highly prejudicial. The last three pages in the transcript of the argument reflect not only a "dramatic appeal to gut emotion" - the prosecutor is actually urging the

jury to recommend appellant's death solely as an expression of their outrage.

This Court, and the District Courts of Appeal, have long recognized that "[t]he trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament." Stewart v. State, 51 So.2d 494, 495 (Fla. 1951); Glassman v. State, 377 So.2d 208, 211 (Fla. 3d DCA 1979). It is improper for a prosecutor "to apply offensive epithets to defendants or their witnesses, and engage in vituperative characterizations of them." Johnson v. State, 102 So.2d 549, 550 (1924) (defendant denounced as a "brute" who "went out there for what cats and dogs fight for"); Glassman v. State, supra, at 211 (prosecutor mocked defendant, a physician, "Donald Duck - quack, quack); Green v. State, 427 So.2d 1036, 1038 (Fla. 3d DCA 1983) (defendant characterized as "dragon lady"). "There is no reason under any circumstances at any time for a prosecuting officer to be rude to a person on trial. It is a mark of incompetency to do so." Daugherty v. State, 17 So.2d 290, 291 (Fla. 1944); Glassman v. State, supra, at 211; Green v. State, supra, at 1038.

It has likewise been recognized that it is improper for a prosecutor to make an emotional appeal to the sympathy of the jury. See Singer v. State, 109 So.2d 7, 27-30 (Fla. 1959); Breniser v. State, 267 So.2d 23, 25 (Fla. 4th DCA 1972); Knight v. State, 316 So.2d 576, 578 (Fla. 1st DCA 1975); Harper v. State, 411 So.2d 235, 237 (Fla. 3d DCA 1982); Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983).

As in Peterson v. State, 376 So.2d 1230, 1233 (Fla. 3d DCA 1979), "the final entry in this mail order catalogue of prosecutorial misconduct occurred in the penultimate paragraph of the argument."

In Peterson, the prosecutor said:

> Not only do they have to get into these disguises and crawl down there and deal with people like this, but they have to deal with people like his lawyer and be attacked and slandered through the whole thing, and they have to do this in front of a jury.

The appellate court found "[t]his tasteless personal reference to the defendant and to his attorney as well [to be] perhaps the most offensive remark of all."

In the present case, the prosecutor argued first. [Contrast Darden v. State, 329 So.2d 287, 289 (Fla. 1976) and Darden v. Wainwright, 699 F.2d 1031, 1034-35 (11th Cir. 1983) - obviously, none of the prosecutor's inflammatory remarks can be written off as "invited error"]. After repeated references to appellant as a "monster", an "animal", and as something other than a human being - calculated to dehumanize appellant in the eyes of the jury in order to make it easier for them to vote for his death - and after several gratuitous remarks about Mr. Tassone doing the best he could with what he had to work with, which was nothing, the prosecutor then proceeded to conclude his argument by injecting poison into defense counsel's upcoming argument:

> When it's all over, Mr. Tassone has the next time and listen to him carefully because he is going to try and make this creature look human this morning, this monster that killed and mutilated those beautiful bodies that you looked at but listen to him very carefully.

The prosecutor's comments about defense counsel doing "the best he could" with what he had to work with were highly improper; such comments are designed to drive a wedge between the defendant and his attorney in the jury's mind, implying that the defense attorney is only doing what he's paid to do and doesn't really believe in his client's

innocence or human worth any more than the prosecutor does. See Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977); Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981). By his final outrageous remark, Mr. Austin not only concluded his own emotional diatribe with a bang, but also tainted anything defense counsel might say in his client's behalf as an attempt "to make this creature look human." Cf. Houston v. Estelle, supra, at 377-78.

Where the prosecutor's argument is so thoroughly prejudicial as to destroy the fundamental fairness of the proceeding, reversal on appeal is necessary even if no objection was made below. See Pait v. State, 112 So.2d 380, 385 (Fla. 1959); Peterson v. State, supra, at 1233-35; Meade v. State, 431 So.2d 1031, 1032 (Fla. 4th DCA 1983); Hance v. Zant, supra. In the instant case defense counsel objected to only one of the prosecutor's remarks. See Peterson v. State, supra, at 1234; Darden v. Wainwright, supra, at 1033. This inexplicable fact[21] is not controlling. "[W]hen an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence

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[21] Should it become necessary, appellant reserves the right to raise issues relating to possible ineffective assistance of counsel by means of a motion pursuant to Fla.R.Cr.P. 3.850. See State v. Barber, 301 So.2d 7 (Fla. 1974). While appellate counsel is not in a position to determine what, if any, specific instances of ineffectiveness could be raised [since the Office of the Public Defender for the Second Circuit is presently unable to handle collateral proceedings in capital cases], there does not appear to be any conceivable tactical reason for defense counsel's failure to object to many of the prosecutor's more reprehensible remarks. See Agee v. Wyrick, 546 F.2d 1324 (8th Cir. 1976); Commonwealth v. Hubbard, 372 A.2d 687, 698-700 (Pa. 1977); Commonwealth v. Barren, 417 A.2d 1156, 1159-61 (Pa. Super. 1979); State v. Luna, 264 N.W.2d 485, 590-91 (S.D. 1978

of a rebuke by the trial judge." Pait v. State, supra, at 385; Peterson v. State, supra, at 1234; Meade v. State, supra, at 1032. This Court has noted "the difficulty, if not the impossibility, of eradicating from the jury's mind the effect of improper argument." Bell v. State, 208 So.2d 474, 476 (Fla. 1st DCA 1968), citing Pait v. State, supra. "If you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962); United States v. Garza, 608 F.2d 659, 666 (5th Cir. 1979). In the instant case, the prosecutor tossed enough skunks into the jury box for each juror to have his own. [See Hance v. Zant, supra; Peterson v. State, supra; Houston v. Estelle, supra, Kelly v. Stone, supra, with regard to the cumulative effect of protracted prejudicial argument].

The state will presumably argue - somehow - that Mr. Austin's tirade was "fair comment", on the theory that the crime was senseless and horrible. However, the fact that the crime itself would naturally arouse strong emotional reactions in the jurors is all the more reason for the prosecutor to try to exercise some restraint, rather than pouring gasoline on the fire as he did. See Hance v. Zant, supra, at 951 (prosecutor's "fervent appeal to the fears and emotions of an already aroused jury was error of a constitutional dimension"). Mr. Austin is no over-eager "rookie" prosecutor; he is the State Attorney for the Fourth Circuit, and he knows better, or should. His argument was consciously, powerfully, and even admittedly aimed at getting the jury to return a death recommendation based on their emotional reaction to the crime, and he succeeded in this purpose. Maybe the jury would have reached the same result after a fair argument on behalf of the state, an untainted argument on behalf of appellant, and unimpassioned consideration of the aggravating and mitigating

circumstances; on the other hand, maybe they would not have. In any event, the penalty proceeding in this case was fundamentally unfair, and the sentence of death imposed pursuant thereto cannot constitutionally be carried out. Hance v. Zant, supra.

## IV CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his convictions and death sentences and remand this case for a new trial, to be held in a location outside of the Jacksonville media market [Issues I, II, III, and IV].

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his death sentences and remand this case for a new penalty proceeding (Issue V).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by mail to Ms. Kathryn Sands, Assistant Attorney General, Suite 513, Duval County Courthouse, Jacksonville, Florida, 32202, and a copy has been mailed to appellant, Mr. Allen Lee Davis, #040174, Post Office Box 747, Starke, Florida, 32091, this 25 day of July, 1983.

Steven L. Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

ALLEN LEE DAVIS,

Appellant,

v. CASE NO. 63,374

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "AB". Other references will be as denoted in appellant's initial brief. This reply brief is directed to Issues I, II, and III; appellant will rely on the arguments advanced in his initial brief as to Issues IV and V.

III ARGUMENT

ISSUE I

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT APPELLANT'S MOTION FOR CHANGE OF VENUE.

There appears to be some confusion in both appellant's initial brief (p.20-21) and the state's answer brief (p.11-12) as to the number of prospective jurors, and actual trial jurors, who acknowledged having some prior knowledge of the case. Appellant inadvertently missed Mrs. Arceneaux, who stated that

she had some knowledge of the case from the news media (T.661) and who served on the jury (T.774). With the inclusion of Mrs. Arceneaux, there were at least ten prospective jurors[1] who knew something about the case from their exposure to the pre-trial publicity, and four of these - Richardson, Jackson, Griswold, and Arceneaux - actually served on the jury.

Far more significant than the number of jurors who acknowledged having acquired some extra-judicial knowledge of the case is the fact that (as a consequence of the trial court's denial of appellant's motion for individual and sequestered voir dire) the voir dire examination of the prospective jurors was incapable of revealing specifically what each juror had learned about the case. In light of the fact that the Jacksonville media - including the city's three network television stations and two major newspapers - had disclosed that appellant had taken a polygraph examination and failed it[2], there is a reasonable likelihood,

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[1] Richardson (T.599-600,651), Lane (T.644-46), Stanley Johnson (T.599,646-47), Jackson (T.601-02,650-51), Cassidy (T.564,625,636-37), Griswold (T.609), James Johnson (T.677,688-89), Robb (T.770), Price (T.763, see T.741), and Arceneaux (T.661).

[2] State v. Stiltner, 491 P.2d 1043 (Wash.1971), which is referred to extensively in appellant's initial brief, discusses the inherently prejudicial effect of the media's pre-trial disclosure of polygraph results, and emphasizes the incapability of the voir dire process to cure the prejudice. See also People v. Taylor, 447 NE2d 519,522 (Ill.App.1973), in which the news media reported that the defendant had taken a lie detector test (one article said he failed it and another article said that the test was inconclusive), while co-defendant was released after passing a lie detector test. The appellate court reversed Taylor's murder and robbery convictions, holding that the trial court' refusal to grant a change of venue deprived him of an impartial trial. The court noted the highly prejudicial nature of the publicity regarding the polygraph tests, and said:

> The "little black box" or lie testing equipment, while apparently not infallible, has been used in criminal investigations for many years and has been adopted by some employers for use in screening applicants for employment. In the minds of laymen it has achieved the status of being the "last word" in determining the truthfulness or untruthfullness of an examinee.

Cf. Goins v. McKeen, 605 F.2d 949 (6th Cir.1979)(media disclosure of information which was both inadmissible and highly probative of guilt).

not dispelled by the voir dire examination, that one or more of these jurors knew that appellant failed the polygraph. This information is inadmissible and grossly prejudicial, both because of the unreliability of polygraph testing and because of the readiness of many laymen to regard it as conclusive. See appellant's initial brief, p. 28, 61-62. Yet the media's disclosure of appellant's failure of the polygraph test was only one aspect of the prejudicial publicity in this case. In his initial brief, appellant identified nine distinct varieties of publicity which have been recognized as inherently prejudicial to an accused in a criminal case, and which occurred to a substantial degree in the instant case. See appellant's initial brief, p. 5-6, 7-18, 18-19, 22-26. Appellant also pointed out that the Jacksonville Sheriff's Department played an active role in disseminating the prejudicial publicity. See initial brief, p. 29-33. The state's response to appellant's argument - both in terms of the content of the publicity and the case law - is to ignore it. The state, in essence, takes the simplistic position that since the four individuals who acknowledged having previous knowledge of the case gained through publicity each said they could put aside their prior knowledge and render a verdict based on the evidence presented at trial, appellant's right to an impartial jury was adequately protected without a change of venue (see AB 11-12). However, it is well recognized that where a juror has been exposed to prejudicial publicity, his assurances that he can be impartial are not necessarily dispositive. See Sheppard v. Maxwell, 384 U.S. 333, 351 (1966);

Irvin v. Dowd, 366 U.S. 717, 728 (1961); Singer v. State, 109 So.2d 7, 24 (Fla. 1959); Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981). See also Coleman v. Zant, 708 F.2d 541, 546-47 (11th Cir. 1983) (the primary facts regarding defendant's claim of presumed prejudice concern the nature and scope of the pre-trial publicity and its effect on the community where the trial was held; voir dire is not conclusive evidence of absence of prejudice). Where the nature of the publicity as a whole raises a significant possibility of prejudice, and a juror acknowledges some exposure to that publicity, it is the responsibility of the trial court, not the juror himself, to make the ultimate determination of whether his impartiality has been impaired. United States v. Hawkins, 658 F.2d 279, 283, 285 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 197 (5th Cir. 1978), see State v. Goodson, 412 So.2d 1077, 1083 (La. 1982). Because the voir dire examination in the instant case was incapable of revealing what each juror had heard or read, the trial court was not in a position to fulfill his constitutional responsibility in this regard.

The Sixth Amendment guarantees the right to be tried by an impartial jury; the failure to protect this right "violates even the minimal standards of due process". Irvin v. Dowd, 366 U.S. 717 (1961); United States v. McIver, 688 F.2d 726, 729-30 (11th Cir. 1982); People v. Cole, 298 NE2d 705, 711 (Ill. 1973). The trial court's failure to grant a change of venue, or even to permit questioning of the prospective jurors outside one another's presence to determine whether any irrep-

arably prejudicial information (such as the polygraph results or appellant's criminal record) had come to their attention through their exposure to the television and newspaper publicity, deprived appellant of this basic and fundamental right. As a result, reversal of his convictions and death sentences is constitutionally required. People v. Cole, supra; see Tumey v. Ohio, 273 U.S. 510 (1927); Payne v. Arkansas, 356 U.S. 560 (1958); Rideau v. Louisiana, 373 U.S. 723 (1963); Chapman v. California, 386 U.S. 18 (1967); Holloway v. Arkansas, 435 U.S. 475 (1978); Connecticut v. Johnson, __U.S.__, 103 S.Ct. 969 (1983)(recognizing that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error).

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE.

Much of the argument contained in Issue I of this reply brief applies equally to Issue II, particularly the principle that it is the responsibility of the trial court[3] to determine the impartiality (or lack thereof) of a prospective juror who has been exposed to pre-trial publicity; the juror's unilateral (and possibly self-serving, or sincere but unrealistic, see Irvin v. Dowd, supra) assurances that he can put aside whatever extra-judicial knowledge he has cannot be dispositive, particularly when the method of voir dire adopted by the trial court precludes the court and the attorneys from determining what particular information the juror has acquired. See United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); United States v. Davis, 583 F.2d 190 (5th Cir. 1978); State v. Goodson, 412 So.2d 1077 (La. 1982). In State v. Goodson, supra (at 1081), for example, the Louisiana Supreme Court stated "A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind." In the instant case, courtesy of the Jacksonville Sheriff's Department and the news media, a great deal of information of this nature was broadcast throughout the community, including

3 See also Perri v. State, 426 So.2d 1021, 1024-25 (Fla. 3d DCA 1983)(while counsel for defen nd state are participants in voir di process, the ultimate responsi in securing an impartial jury is upon the trial court).

the inadmissible fact that appellant failed a lie detector test, the inadmissible fact that he had a number of prior convictions of violent crimes, the inadmissible fact that he was on parole at the time of the murders, and the fact that he admitted to police that he was in the Weiler home at the time the medical examiner said the murders occurred; as well as substantial amounts of inflammatory material (see appellant's initial brief, p. 19 and p. 5-18). At least ten prospective jurors, and at least four of the actual trial jurors,[4] had heard or read something about the case. Under these circumstances, there is a distinct possibility that one or more of the jurors had extra-judicial knowledge of inadmissible and highly incriminating material which, notwithstanding their assurances of impartiality made in good faith, would render it impossible for them to be fair and impartial jurors in the case.[5] The method of voir dire employed

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[4] With the inclusion of Mrs. Arceneaux (see Issue I, supra), appellant must correct the assertion in his initial brief that nine prospective jurors, and three of those selected to try the case, had prior knowledge of the case.

[5] The state mischaracterizes appellant's argument as "speculat[ing] that three of the jurors may have hidden their prejudices" (AB 16). To the contrary, appellant attributes no misconduct to the jurors. Appellant's argument is simply that, as a result of their acknowledged exposure to pre-trial publicity, and because the publicity contained so much material which was incriminating, inadmissible, and/or inflammatory, these jurors may well have had extra-judicial knowledge which was inherently prejudicial, notwithstanding the juror's sincere belief that he could put it aside. A new trial is required as a result of the trial court's failure to protect appellant's right to an impartial jury, either by granting a change of venue (Issue I), or by adopting a method of voir dire which would enable the juror to disclose what in particular he had heard or read about the case, and enable the court to make an independent determination of the juror's impartiality (Issue II).

by the trial court, after his denial of appellant's motion for individual and sequestered voir dire, failed to "give reasonable assurance that prejudice would be discovered if present" (see United States v. Hawkins, supra; United States v. Davis, supra; McCorquodale v. Balkcom, 705 F.2d 1553, 1559-60, n. 17 (11th Cir. 1983)), and it severely impaired the defense's ability to intelligently exercise its right to challenge for cause[6] (State v. Goodson, supra; United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977)) and its peremptory challenges (United States v. Rucker, supra; see Swain v. Alabama, 380 U.S. 202, 219 (1965)). Reversal of appellant's convictions and death sentences is constitutionally required.[7] United States v. Hawkins, supra; United States v. Davis, supra; see People v. Cole, supra and the cases cited on p. 5 of this reply brief.

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[6] "A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice." United States v. Rucker, supra, at 1049.

[7] The state's suggestion that this issue is raised for the first time on appeal is barely worthy of comment. Appellant filed a written motion for individual and sequestered voir dire on June 9, 1982, in which he fully asserted the ground now argued on appeal (exposure of the jury panel to prejudicial publicity, and the inability to reveal a juror's knowledge without tainting the entire venire) as well as another ground relating to "death-qualification" (R. 142-46). Defense attorney Tassone, upon replacing the Public Defender's office as appellant's counsel, adopted a number of motions previously filed on behalf of appellant, including the motions for change of venue and individual and sequestered voir dire (R. 269). Immediately prior to jury selection, defense counsel called the court's attention to the pending motion for individual and sequestered voir dire, and the court denied the motion. (T.532).

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR LANE.

Appellant argued in his initial brief that the trial court's clearly erroneous denial of his challenge for cause to Mrs. Lane requires reversal, without consideration of whether he exhausted his peremptory challenges. [Appellant had one peremptory challenge remaining when the jury was accepted]. In support of his position, appellant called the Court's attention to the Supreme Court of Missouri's decision in State v. Morrison, 557 SW2d 445 (Mo. 1977) (holding that in determining on appeal the propriety of a trial court's ruling on a challenge for cause, it is improper to mix with it a consideration of the question as to whether or not the complaining party had exhausted his peremptory challenges). Appellant quoted extensively from the Morrison opinion, and argued that the legal principles and reasoning contained therein are equally applicable under the Florida and federal constitutions. The state, in its answer brief, says "Appellant now maintains that pursuant to Missouri case law this Court should not consider whether or not he had exhausted his peremptory challenges" (AB.21).

Instead of offering any reason why the reasoning of the Missouri Supreme Court in Morrison should not be persuasive, the state prefers to rely on a case involving the converse situation [Singer v. State, 109 So.2d 7 (Fla. 1959), in which the defendant did exhaust his peremptory challenges, and the

Court considered this fact in determining that the denial of a challenge for cause was reversible error], and on certain language in another case, Paramore v. State, 229 So.2d 855, 858 (Fla. 1969), which is (a) not on point, (b) self-acknowledged dicta, and (c) no longer even arguably good law. The state cites Paramore for the proposition that "in sustaining the trial judge's excusal of jurors for cause [because they expressed their convictions against imposition of the death penalty] the Court considered the fact that 'the State had more than enough remaining peremptory challenges available to have removed those prospective jurors had the trial judge declined to do so.'" Paramore, therefore, involved a Witherspoon[8] issue. The excerpt quoted by the state is clearly dicta; because the Court held on the merits that the excusal of the jurors was proper, and further held that the defendant was in no position to complain because he had not objected at trial to the excusal of the jurors, or expressed any desire to keep them. With regard to the matter of the state's having enough peremptory challenges to have removed the jurors had the court declined to excuse them, this Court said "Although this fact may be considered in sustaining the action of the trial judge, we should hesitate in conjecturing that the prosecutor would have used his peremptory challenges to excuse all such jurors". Paramore v. State, supra, at 858. The main weakness, however, in the state's reliance on the Paramore dictum is

[8] Witherspoon v. Illinois, 391 U.S. 510 (1968)(prospective jurors may not be excused for cause simply for voicing general objections to the death penalty).

that it is no longer even arguably valid in light of this Court's recent decision in Chandler v. State, __So.2d__ (Fla. 1983)(case no. 60,790, opinion filed July 28, 1983)(1983 FLW 291)(improper exclusion of an otherwise qualified juror in violation of Witherspoon is harmful and reversible error regardless of whether the state utilized all of its peremptory challenges). Accord, Davis v. Georgia, 429 U.S. 122 (1976); Witt v. Wainwright, __F.2d__ (11th Cir. 1983)(case no. 81-5740, opinion filed September 16, 1983). To the extent that the issues are analogous, Davis, Chandler, and Witt support appellant's position that the Missouri Supreme Court's analysis in Morrison is correct - the trial court's denial of a challenge for cause, if clearly erroneous, should be grounds for reversal without requiring the defendant to expend his peremptory challenges. See Swain v. Alabama, supra; United States v. Mobley, 656 F.2d 988, 989-90 (5th Cir. 1981); United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982); Carr v. Watts, 597 F.2d 830 (2nd Cir. 1979); United States v. Turner, 558 F.2d 535 (9th Cir. 1977); Worthen v. State, 399 A.2d 272, 278 n. 3 (Md.App. 1979)(any error which impairs the exercise of peremptory challenges requires reversal, and no showing of prejudice is required). See also Francis v. State, 413 So.2d 1175, 1178-79 (Fla. 1982)(exercise of peremptory challenges is essential to fairness of trial by jury; it is "an arbitrary and capricious right which must be exercised freely to accomplish its purpose"); Maine v. Superior Court of Mendocino County, 438 P.2d 372 (Cal.

1968); Olson v. North Dakota District Court, 271 NW2d 574, 578-79 (ND 1978)(recognizing that a defense attorney may reasonably be reluctant to exhaust his peremptory challenges).

## IV CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his convictions and death sentences and remand this case for a new trial, to be held in a location outside of the Jacksonville media market [Issues I, II, III, and IV].

Based on the argument, reasoning, and citation of authority contained in his initial brief, appellant respectfully requests that this Court reverse his death sentences and remand this case for a new penalty proceeding (Issue V).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Kathryn Sands, Assistant Attorney General, Suite 513, Duval County Courthouse, Jacksonville, Florida 32202 and a copy mailed to appellant, Mr. Allen Lee Davis, #040174, Post Office Box 747, Starke, Florida 32091 on this 24th day of October, 1983.

STEVEN L. BOLOTIN